

**From:** (b)(6); (b)(7)(C)  
**Sent:** 6 Mar 2020 21:00:57 +0000  
**To:** OPLA HQ Personnel;OPLA Field Personnel  
**Subject:** UPDATE: Temporary Stay LIFTED – PI Enjoining Application of Third-Country Transit IFR to Aliens "Metered" On or Before July 16, 2019 -- *Al Otro Lado v. Wolf*, --- F.3d ---, 2020 WL 1059682 (9th Cir. Mar. 5, 2020)

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ONLY\*\*\*NOT FOR DISSEMINATION OUTSIDE OPLA\*\*\***

*Disseminated on behalf of Ken Padilla and Adam V. Loiacono . . .*

This message updates the guidance below concerning application of *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019) (codified at 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4)) (“the third-country transit IFR”) to members of a provisionally certified class defined as “all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” *Al Otro Lado v. McAleenan*, No. 17- 02366, 2019 WL 6134601 (S.D. Cal. Nov. 19, 2019) (order granting Plaintiffs’ motion for provisional class certification and Plaintiffs’ motion for preliminary injunction).

On March 5, 2020, the U.S. Court of Appeals for the Ninth Circuit denied the Government’s motion for a stay pending appeal of the November 19, 2019 preliminary injunction entered by the U.S. District Court for the Southern District of California enjoining application of the third-country transit IFR to members of the class. *Al Otro Lado v. Wolf*, --- F.3d ---, 2020 WL 1059682 (9th Cir. Mar. 5, 2020). Because the previously issued injunction is again in place, OPLA attorneys should immediately revert to the guidance and practice pointers in the December 5, 2019 broadcast message below.

**This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.**

Thank you,

Ken Padilla  
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Office of the Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
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Adam V. Loiacono

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**From:** (b)(6); (b)(7)(C) @ice.dhs.gov>  
**Sent:** Tuesday, December 31, 2019 9:06 AM  
**To:** OPLA HQ Personnel <(b)(7)(E)@ice.dhs.gov>; OPLA Field Personnel  
(b)(7)(E)@ice.dhs.gov>  
**Subject:** UPDATED Broadcast Message: Temporary Stay of PI Enjoining Application of Third-Country Transit IFR to Aliens "Metered" On or Before July 16, 2019 -- *Al Otro Lado v. Wolf*, --- F.3d ---, 2019 WL 7046371 (9th Cir. Dec. 20, 2019)

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*Disseminated on behalf of Adam V. Loiacono and Mark P. Murphy . . .*

-  
This message updates the guidance below concerning application of *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019) (codified at 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4)) (“the third-country transit IFR”) to members of a provisionally certified class defined as “all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” *Al Otro Lado, Inc. v. McAleenan*, No. 17- 02366, 2019 WL 6134601 (S.D. Cal. Nov. 19, 2019) (order granting Plaintiffs’ motion for provisional class certification and Plaintiffs’ motion for preliminary injunction).

On December 4, 2019, the Government filed an appeal and a request to stay the preliminary injunction issued by the U.S. District Court for the Southern District of California with the U.S. Court of Appeals for the Ninth Circuit, and on December 20, 2019, the Ninth Circuit issued an order temporarily staying the district court’s class certification and the November 29, 2019 preliminary injunction pending a decision on the motion for stay pending appeal. *Al Otro Lado v. Wolf*, --- F.3d ---, 2019 WL 7046371 (9th Cir. Dec. 20, 2019). In light of the temporary stay of the preliminary injunction, (b)(5)

(b)(5) The relevant ERO guidance is available HERE.

(b)(5)

Should you have any questions regarding this case, please contact the District Court Litigation Division at (b)(6); (b)(7)(C).

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Thank you,

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**From:** (b)(6); (b)(7)(C)

**Sent:** Thursday, December 5, 2019 4:22 PM

**To:** (b)(6); (b)(7)(C) OPLA Field Personnel

(b)(6); (b)(7)(C)

**Subject:** Broadcast Message: Preliminary Injunction Enjoining Application of Third-Country Transit IFR to Aliens "Metered" On or Before July 16, 2019 -- *Al Otro Lado, Inc. v. McAleenan*, No. 17- 02366 (S.D. Cal. Nov. 19, 2019)

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*Disseminated on behalf of Ken Padilla and Adam V. Loiacono . . .*

-  
On November 19, 2019, the U.S. District Court for the Southern District of California issued a preliminary injunction enjoining application of *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019) (codified at 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4)) (“the third-country transit IFR”) to members of a provisionally certified class defined as “all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” *Al Otro Lado, Inc. v. McAleenan*, No. 17- 02366 (S.D. Cal. Nov. 19, 2019) (order granting Plaintiffs’ motion for provisional class certification and Plaintiffs’ motion for preliminary injunction), ECF No. 330. The third-country transit IFR continues to apply to any non-class member who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019. The Government has filed an appeal and an emergency motion to stay the district court’s order. *Al Otro Lado*, No. 17-02366 (S.D. Cal. Dec. 4, 2019) ECF No. 335 (notice of appeal), 336 (emergency motion to stay preliminary injunction).

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Should you have any questions regarding the applicability of the preliminary injunction, please contact DCLD at (b)(6); (b)(7)(C)

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Thank you,

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**Forms of Protection – Unofficial Rough Comparison Chart**

\*\*\*ATTORNEY WORK PRODUCT\*\*\*DO NOT DISSEMINATE OUTSIDE OF ICE OPLA\*\*\*

|  | <b>Overseas Refugee Admission</b>  | <b>Asylum</b>   | <b>Statutory Withholding of Removal</b>                           | <b>CAT Withholding &amp; Deferral of Removal</b>              |
|--|--|---|---|---|
| <b>Underlying International Conventions (Non-Self Executing)</b> | 1951 UN Convention Relating to Status of Refugees / 1967 Protocol <sup>1</sup> | 1951 UN Convention Relating to Status of Refugees / 1967 Protocol | 1951 UN Convention Relating to Status of Refugees / 1967 Protocol | 1984 UN Convention Against Torture                            |
| <b>Key U.S. Implementing Laws</b>                                | 1980 Refugee Act / INA 207 / 8 CFR 207, 1207                                   | 1980 Refugee Act / INA 208 / 8 CFR 208, 1208                      | 1980 Refugee Act / INA 241(b)(3) / 8 CFR 208, 1208                | 1998 Foreign Affairs Reform & Restruct. Act / 8 CFR 208, 1208 |
| <b>Key Adjudicating Agency</b>                                   | DHS (USCIS)  | DHS (USCIS) & DOJ (EOIR)  | DOJ (EOIR)  | DOJ (EOIR)  |

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**OPLA 101 – Protection Law: Technicalities, Techniques, and Tips**  
**Handout 2 – Table of Authorities**  
(rev. 11/24/20)

**Brief Overview of 207 Overseas Refugee Status, Asylum, Statutory Withholding, and Convention Against Torture Protection**

*207 Overseas Refugee Status:*

- INA § 101(a)(42)(A) (the term refugee means, *inter alia*, any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).
- INA § 207 (overseas refugee statute, providing, *inter alia*, that the number of refugees who may be admitted to the U.S. in any fiscal year “shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.”)
- 8 C.F.R. Part 207 (general overseas refugee regulations)
- *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, 84 Fed. Reg. 65903 (2019).

*Asylum:*

- INA § 208 (asylum statute; subsection (a) provides that any alien who is physically present in the United States or who arrives in the United States, whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters, irrespective of such alien’s status, may apply for asylum).
- 8 C.F.R. §§ 208.13, 1208.13 (key regulations concerning asylum eligibility)
- *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (explaining the well-founded fear of persecution standard).
- *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008) (noting that when an IJ finds that the alien is a refugee based on past persecution, then under 8 C.F.R. § 1208.13(b)(1), the alien is presumed to have a well-founded fear of persecution on the basis of the original claim; in such a case, the burden shifts to DHS to establish by a preponderance of the evidence that there has been a fundamental change in circumstances such that the alien no longer has a well-founded fear of future persecution in his country of nationality, or that the applicant could avoid future persecution by relocating to another part of the country and that under the circumstances, it would be reasonable to expect the alien to do so).



- *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012) (“humanitarian asylum” case; holding that pursuant to 8 C.F.R. § 1208.13(b)(1)(iii), an asylum applicant who has established past persecution but no longer has a well-founded fear of future persecution may nevertheless warrant a discretionary grant of humanitarian asylum based not only on compelling reasons arising out of the severity of the past harm, but also on a “reasonable possibility” that he or she may suffer other serious harm upon removal to his or her country and providing factors and considerations for determining whether an alien faces a “reasonable possibility” of “other serious harm”).

*Statutory Withholding of Removal:*

- INA § 241(b)(3) (statutory withholding statute; an alien cannot be removed to a country where the alien’s “life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion).
- 8 C.F.R. § 1208.16(a)-(b), (d) (key regulations concerning eligibility for statutory withholding of removal)

*Convention Against Torture:*

- 8 C.F.R. §§ 1208.16(c)-(d), .17, .18 (key regulations concerning eligibility for Convention Against Torture withholding and deferral of removal)

- *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 & n.4 (A.G. 2006) (b)(5)

(b)(5)

- *Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018) (holding that where the evidence regarding a CAT application plausibly establishes that abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions in the country of removal are the result of neglect, a lack of resources, or insufficient training and education, rather than a “specific intent” to cause severe pain and suffering, an IJ’s finding that the applicant did not establish a sufficient likelihood that he or she will experience “torture” in these settings is not clearly erroneous).
- *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020) (referring, vacating, and remanding the BIA’s decision in *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019); while otherwise agreeing with the BIA that the 8 C.F.R. § 1208.18(a) phrase “public official or other person acting in an official capacity” covers pertinent conduct committed by an individual who is acting “in an official capacity,” that is, “under color of law,” clarifying that nothing in *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002), should be construed to endorse a distinct “rogue official” standard, and that the “color of law” analysis draws no categorical distinction between acts of low-level versus high-level officials). *But see Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) (b)(5)

(b)(5)

**Bars**

(Selected Points on Asylum Bars)

*INA § 208(a)(2)(B) one-year filing deadline bar*

- *Mendez Rojas* class action to INA § 208(a)(2)(B) one-year filing deadline. See *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018), *appeal docketed*, No. 18-35443 (9th Cir. May 25, 2018). The U.S. District Court for the Western District of Washington granted the parties’ joint motion for approval of a settlement agreement to implement the permanent injunction. The settlement agreement is applicable nationwide and can be found [here](#). The current OPLA FLO guidance, dated 11/6/20, can be found [here](#).

*INA § 208(b)(2)(A)(ii) particularly serious crime bar*

- (b)(5)
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*INA § 208(b)(2)(A)(iii) serious nonpolitical crime bar*

- INA § 208(b)(2)(A)(ii) (“there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to . . . arrival”).
- *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012) (citing *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984), for the proposition that “in evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common law character,” and that such “would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature”) (internal quotation marks and bracket omitted); *id.* (b)(5)

(b)(5)

(b)(5)

- *Matter of W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020) (b)(5)

(b)(5)

*INA § 208(b)(2)(A)(vi) firm resettlement bar*

- *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (b)(5)  
(b)(5)
- *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020) (holding that for purposes of determining whether an alien is subject to the firm resettlement bar to asylum, a viable and available offer to apply for permanent residence in a country of refuge is not negated by the alien's unwillingness or reluctance to satisfy the terms for acceptance).

*8 C.F.R. § 1208.13(c)(3) bar concerning violations of Presidential orders suspending entry on southern border between ports-of-entry*

- *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (affirming a U.S. district court nationwide injunction against enforcement of the bar).

*8 C.F.R. § 1208.13(c)(4) so-called third country transit bar*

- *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (affirming a U.S. district court preliminary injunction against enforcement of the regulatory bar, with effect in the four states on the U.S. border with Mexico); *Capital Area Immigrants' Rights Coal. v. Trump*, --- F. Supp. ---, 2020 WL 3542481 (D.D.C. June 30, 2020) (vacating the regulatory bar) (ILPD's July and August 2020 guidance blasts on the D.C.C. decision are available respectively, [here](#) and in the *ILPD BIA and Federal Court Weekly Digest for the week of August 3, 2020* e-mail sent out on 8/13/20, [here](#)).
- *See also Al Otro Lado v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. 2019) (granting preliminary injunction for provisionally certified class of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. port of entry before July 16, 2019, because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."); *Al Otro Lado v. Wolf*, No. 17-02366, 2020 WL 6381893 (S.D. Cal. Oct. 30, 2020) (court order clarifying the implementation of the preliminary injunction). OPLA's most recent guidance relating to the ongoing *Al Otro Lado* litigation can be found [here](#).

*Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020) (to be codified at 8 C.F.R. §§ 208.13(c)(6), 1208.13(c)(6))

- OPLA's initial guidance, dated 11/3/20, addressing the rule can be found [here](#). *But see Pangea Legal Services v. U.S. Dep't of Homeland Sec.*, No. 20-07721, 2020 WL 6802474 (N.D. Cal. Nov. 19, 2020) (granting Plaintiffs' motion for a temporary restraining order enjoining Defendants from implementing or enforcing the rule). OPLA's most recent guidance addressing the Northern District of California's order can be found [here](#).

(Selected Points on Bars to Statutory Withholding of Removal and CAT Protection)

*INA § 241(b)(3) particularly serious crime bar*

- INA § 241(b)(3) (providing, *inter alia*, that “an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime,” and that, the Attorney General is not precluded “from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime”).

### **Bars & Burdens of Proof**

- 8 C.F.R. § 1240.8(d) (mandating that the alien bears the burden of proof concerning eligibility for discretionary relief, such as asylum, and providing that “[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply”).
- 8 C.F.R. § 1208.16(d)(2) (providing that “[i]f the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply”).
- *Matter of Negusie*, 28 I&N Dec. 120, 152-55 (A.G. 2020) (discussing the operation of the regulations and associated authority); *Matter of W-E-R-B-*, 27 I&N Dec. 795, 797 (BIA 2020) (same).

### **Credibility v. Corroboration**

INA § 208(b)(1)(B)(ii) (b)(5) [redacted]  
(b)(5) [redacted] 8 C.F.R. § 1208.13(a) (same).

INA § 208(b)(1)(B)(iii) (b)(5) [redacted]  
(b)(5) [redacted]

INA § 208(b)(1)(B)(ii) (“Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”).

INA § 241(b)(3)(C) (cross-referencing INA § 208(b)(1)(B)(ii)-(iii) as applicable to applications for statutory withholding of removal); 8 C.F.R. § 1208.16(b) (reiterating that credible testimony may be sufficient, without corroboration, to sustain an alien’s burden of proof for statutory withholding of removal).

INA § 240(c)(4)(B)-(C) (general burden of proof and credibility provisions for relief and protection from removal, mirroring INA § 208(b)(1)(B)(ii)-(iii), and applicable to applications for CAT protection, *inter alia*); 8 C.F.R. § 1208.16(c)(2) (b)(5) [redacted]  
(b)(5) [redacted]

*Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015) (discussing credibility and corroboration under the REAL ID Act); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007) (same).

*Matter of J-C-H-F-*, 27 I&N Dec. 211 (BIA 2018) (holding that an IJ should assess the accuracy and reliability of a border or airport interview based on the totality of the circumstances in deciding whether to consider it in making a credibility determination).

INA § 208(d)(6) (frivolous asylum application); 8 C.F.R. § 1208.20 (same); *Matter of M-S-B-*, 26 I&N Dec. 872 (BIA 2016) (discussing, *inter alia*, the framework for a frivolous finding – a simple adverse credibility determination is insufficient).

## **Persecution**

### *General Concept of “Persecution”*

- *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (observing that BIA precedents have defined the concept of “persecution” as including three specific elements: (1) an intent to target a belief or characteristic, i.e., an intent to “overcome” the protected characteristic of the victim; (2) the level of harm must be “severe;” and (3) the harm or suffering must be inflicted either by the government of a country or by private actors the government is “unable or unwilling to control”).
- *Matter of T-Z-*, 24 I&N Dec. 163, 172 (BIA 2007) (concerning the level of harm aspect of the concept of “persecution”).

### *“Unable or Unwilling” to Control Element*

- *Compare Grace v. Barr*, 965 F.3d 883, 2020 WL 4032652, at \*9-\*11 (D.C. Cir. 2020) (concerning the implementation of *Matter of A-B-* and related USCIS guidance in credible fear proceedings, rejecting the Government’s argument that the Attorney General’s “condone or complete helplessness” standard is the same as the “unable or unwilling to control” standard, and finding that it is, in fact, more “demanding,” and holding that (b)(5) (b)(5) (b)(5) with *Scarlett v. Barr*, 957 F.3d 316, 331-34 (2d Cir. 2020) (rejecting the argument that the two standards are different, and that the “condone or complete helplessness” standard imposes a new, heightened requirement, but observing that a government that only provides ineffective assistance is a government unable to protect its citizens) and *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232-34 (5th Cir. 2019) (essentially the same as *Scarlett*).
- Practice Recommendation: (b)(5) reference to the “condone or complete helplessness” gloss. Instead, focus on other helpful, and non-controversial language, from *A-B-* explaining the “unable or unwilling control” aspect of the concept of persecution in the context of a non-state actor perpetrator, e.g.:

An applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty controlling private behavior .

. . . The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.

27 I&N Dec. at 337–38 (internal quotation and punctuation marks and citations omitted)’

No country provides its citizens with complete security from private criminal activity, and perfect protection is not required.

*Id.* at 343. *See also* *Burbiene v. Holder*, 568 F.3d 251, 255-56 (1st Cir. 2009) (“It is true that Lithuania has not been able to completely eradicate the problem of human trafficking within its borders, and that the problem persists despite . . . ‘significant efforts’ by the government. Nonetheless, the record does not indicate that Lithuania’s inability to stop the problem is distinguishable from any other government’s struggles to combat a criminal element. Lithuania has experienced both setbacks and successes in its fight against this crime. But these circumstances do not subject the victims of human trafficking to ‘persecution’ under the INA.”); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (holding that police inability to solve the crimes after some investigation does not “compel” a finding that the government is unwilling or unable to control the persecutors) (Ed. Note: use caution in citing this case, as “compel” is a term distinct to circuit court standards of review).

- *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (standing for proposition that an alien applicant is not required to request government protection from a non-state actor where the evidence reflects that such would have been futile).

### **Persecution and Children**

- *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008) (standing for the proposition that children can experience the same type of harm more severely than adults); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (same); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (same).
- *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (in the case of a child “near the age of majority,” standing for the proposition that an adjudicator needs to “calibrate” the analysis of when harm rises to the level of “persecution” in light of the age of a child).
- *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1070-72 (9th Cir. 2017) (discussing children and their limited ability to report abuse from non-state actors).

### **Nexus – Remember All the Puzzle Pieces**

INA § 101(a)(42)(A) (The term ‘refugee’ means any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to

avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

INA § 208(b)(1)(B)(i) (“The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

INA § 241(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”)

*Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) (“The nexus requirement is critically important in determining whether an alien established an asylum claim. (b)(5)

(b)(5)

(internal quotation marks and citations omitted).

*Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that the statutory INA § 208(b)(1)(B)(i) “one central reason” standard for “mixed motive” asylum applications also applies to statutory withholding of removal applications); *but see Barajas-Romero v. Lynch*, 846 F.3d 351, 356-60 (9th Cir. 2017) (rejecting *C-T-L-*, and holding that the proper legal nexus standard for statutory withholding of removal is merely “a reason”); *Guzman-Vazquez v. Barr*, 959 F.3d 253, 270-74 (6th Cir. 2020) (agreeing with *Barajas-Romero*).

*Matter of W-G-R-*, 26 I&N Dec. 208, 223-24 (BIA 2014) (“While the views of the persecutor might play a role in causing members of society to view a particular group as distinct, the persecutor’s views play a greater role in determining whether persecution is inflicted on account of the victim’s membership in a particular social group. Whether that nexus exists depends on the views and motives of the persecutor.”).

*Matter of L-E-A-*, 27 I&N Dec. 40, 44 (BIA 2017) (citing *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212, 214 (BIA 2007), and observing that “under section 208(b)(1)(B)(i) of the Act, [a protected trait] must be at least one central reason for the persecutor’s treatment of the applicant. The protected trait . . . cannot play a minor role--that is, it cannot be incidental or tangential to another reason for harm.”) (internal quotation marks omitted), *overruled on other grounds by Matter of L-E-A-*, 27 I&N Dec. 581, 597 (A.G. 2019) (“I leave the Board’s analysis of the nexus requirement undisturbed. . .”).

*W-G-R-*, 26 I&N Dec. at 218 (“[W]e must separate the assessment whether the applicant has established the existence of one of the enumerated grounds . . . from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.”); *see also M-E-V-G-*, 26 I&N Dec. at 242.

*INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992) (“[P]ersecution on account of . . . political opinion’ [means] persecution on account of the victim’s political opinion, not the persecutor’s . . . . Thus, the mere existence of a generalized ‘political’ motive underlying the guerrillas’ forced recruitment is inadequate to establish [such], as § 101(a)(42) requires . . . . *Elias-Zacarias* objects

that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. (b)(5)

(b)(5)

## **Particular Social Group**

### *Generally*

- *Matter of A-B-*, 27 I&N Dec. 316, 330 (A.G. 2018) (reaffirming BIA precedent that, in order to be cognizable, a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question).

### *Immutability*

- *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (“Applying the doctrine of ejusdem generis (b)(5)

(b)(5)

(b)(5)

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

- *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (finding that the social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice,” is cognizable because being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed, and the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it).
- *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251-52 (BIA 2014) (clarifying the requirements for social distinction and particularity, while also noting that “[n]ot every ‘immutable characteristic’ is sufficiently precise to define a particular social group. The additional requirements of ‘particularity’ and ‘social distinction’ are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society”).

### *Particularity:*

- *M-E-V-G-*, 26 I&N Dec. at 238, 239 (“[T]he ‘particularity’ requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put ‘outer limits’ on the definition of a ‘particular social group.’ . . . The group must be discrete be discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse, or subjective. . . . The particularity requirement clarifies the point, at least implicit in earlier case law, that not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.”) (internal citations omitted).



- *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (finding that the proposed social group of “wealthy Guatemalans” is not sufficiently particular, because “[t]he terms ‘wealthy’ and ‘affluent’ standing alone are too amorphous to provide an adequate benchmark for determining group membership. Depending upon one’s perspective, the wealthy may be limited to the very top echelon; but a more expansive view might include small business owners and others living a relatively comfortable existence in a generally impoverished country. . . . The characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group”).
- *A-M-E- & J-G-U-*, 24 I&N Dec. at 74 (citing *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006), for the proposition that, for purposes of the particularity requirement, “we do not generally require a voluntary associational relationship, cohesiveness, or strict homogeneity among group members”) (internal quotation marks omitted).
- *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (standing for the proposition that the size, i.e., numerosity, of a proposed particular social group is an important, but not determinative, consideration for purposes of the particularity requirement, i.e., “[w]hile the size of the proposed group may be an important factor in determining whether the group can be so recognized<sup>(b)(5)</sup>”).  

(b)(5)

(internal citations and quotation marks omitted); *see also Cece v. Holder*, 733 F.3d 662, 674–75 (7th Cir. 2013) (holding that the size or “breadth of category has never been a per se bar to protected status” and pointing out that “[m]any of the groups recognized by the Board and courts are indeed quite broad,” such as “women in tribes that practice female genital mutilation” and subclans, that the “ethnic Tutsis of Rawanda numbered close to 700,000 before the genocide of 1994, and yet a Tutsi singled out for murder who managed to escape to the United States could surely qualify for asylum,” that “undoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum, if only they had had that opportunity,” and concluding that it “would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims”).

*Social Distinction:*

- *M-E-V-G-*, 26 I&N Dec. at 237 (“The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the ‘social distinction’ requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. . . . A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.”); *id.* at 240 (“To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. . . .”).
- *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014) (“To have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society

in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.”).

- *Matter of L-E-A-*, 27 I&N Dec. 581, 588-89 (A.G. 2019) (concerning family-based particular social groups and related nexus issues, and holding that while certain clans and sub-clans have been recognized as cognizable particular social groups, most nuclear families are not inherently socially distinct and therefore, do not per se qualify as particular social groups).

*Cannot be defined by persecution suffered and/or feared*

- *A-B-*, 27 I&N Dec. at 334 (“To be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum or statutory withholding of removal.”) (internal quotation marks and citation omitted).
- *M-E-V-G-*, 26 I&N Dec. at 242 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74, for the proposition that “a social group cannot be defined exclusively by the fact that its members have been subjected to harm”) (internal quotation marks omitted).
- *See Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (wherein the majority, *see id.* at 1080-87, and the dissent, *see id.* at 1100-02, discuss AG and BIA precedent and whether a particular social group can be defined in part by the persecution suffered and/or feared) (Note: Check your circuit law on this issue when it arises. Within the Ninth Circuit, the majority op. in *Diaz-Reynoso*, holding that a cognizable particular social group can, indeed, be so defined, in part, obviously currently controls).

*Case-by-case and society-in-question (i.e., society-specific) analysis*


- *L-E-A-*, 27 I&N Dec. at 591 (“Since *Matter of Acosta*, the Board has emphasized that a ‘particular social group’ must be particular and socially distinct in the society at question, which itself requires a fact-specific inquiry based on the evidence in a particular case.”).
- *M-E-V-G-*, 26 I&N Dec. at 241 (discussing and demonstrating, by example, the importance of focusing on the society-in-question in analyzing the core particular social group requirements).
- *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (“To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity[.]”).

*Need for clear articulation of the particular social group formulation*

- *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) (holding that an alien applicant must clearly indicate on the record the exact delineation of any proposed particular social group, and that the BIA generally will not address a newly articulated particular social group for the first time on appeal).


*CAUTION!!! – Simple gender-based particular social groups based on gender alone, gender+nationality, or gender+ethnicity*

- Principal Legal Advisor, *Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-*, at 8 (July 11, 2018) (b)(5)  
(b)(5)  
(b)(5) The memorandum is available [here](#).
- *A-B-*, 27 I&N Dec. at 340 (observing that “if an alien’s asylum application is fatally flawed in one respect . . . an immigration judge or the Board need not examine the remaining elements of the asylum claim”).

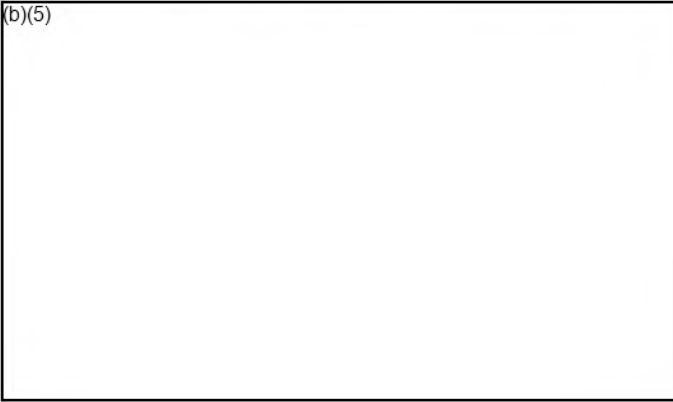


**ICE**

**CAT Claims:  
What's wrong with this  
sentence?**



(b)(5)



U.S. Immigration  
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**8 C.F.R. § 1208.16(c) Eligibility for withholding of removal under the Convention Against Torture.** (1) For purposes of regulations under Title II of the Act, “Convention Against Torture” shall refer to the United Nations Convention Against Torture . . . , subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 . . . . The definition of torture contained in §1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

....

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

- (i) Evidence of past torture inflicted upon the applicant;
- (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (iv) Other relevant information regarding conditions in the country of removal.

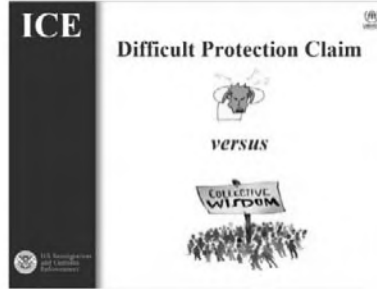
**8 C.F.R. § 1208.18(a) Definitions.** The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

## OPLA 101 – Protection Law: Technicalities, Techniques, and Tips

### Handout 4.1 – Protection Law Case Study Hypothetical: “Working the ABs”

(See also Handout 4.2: Headnotes from *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); 2018 PLA Memorandum *Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-*)



You’ve just been assigned the removal case of Georgette Martinez, a Sylvania national. You see from her I-589 and attached affidavit that she is applying for asylum based on past persecution and a fear of future persecution from her husband, Jorge Trentino, on account of her alleged particular social group status: “married Sylvania women who are unable to leave their relationships.” She has provided sworn affidavits and medical documentation showing that she suffered severe beatings, the last of which resulted in a dislocated shoulder, and a knife-to-throat death threat from her husband, who constantly taunted her: “you are my property, I can do with you as I please.” Her husband also beat their two young children on occasion. He is a former government employee, who is now self-employed.

The respondent testified that she fled their joint residence outside the capital, Sylvania City, after she suffered the dislocated shoulder and her in-laws finally agreed to take in her children and protect them, which they had previously been reluctant to do. She lived for a time with her architect brother in the coastal city of Freedomia before gathering the necessary funds to travel to the U.S. During that time, her husband would call her and threaten to come and “collect” her.

Represented by counsel, your respondent also provided a package of several hundred pages of country condition information and “expert” affidavits allegedly showing widespread domestic violence in Sylvania, a culture of “machismo,” official corruption, and, at best, spotty enforcement of existing laws that criminalize domestic violence, albeit with light penalties. You pull up the State Department *Country Reports* for 2019, however, and see that it reflects that the Sylvania legislature recently doubled the penalties for domestic violence and provided funding for 20 large shelters for battered women and their children in the capital.

In a pre-trial brief, opposing counsel argues that although the Attorney General in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), overruled *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014),<sup>1</sup> he did so because of a lack of fulsome analysis on the part of the BIA. The Attorney General did not rule that women who are victims of domestic violence could never establish a cognizable particular social group or otherwise qualify for asylum.

How would you approach this case? What are some issues that you would like to address and develop in court, e.g.: extent of *A-B-*’s holding; PSG cognizability; state protection; reasonable internal relocation; etc.?

---

<sup>1</sup> In *A-R-C-G-*, the BIA had held that, depending on the facts and evidence in an individual case, “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group that forms the basis of a claim for asylum and statutory withholding of removal.

**(Handout 4.2)**

Cite as 27 I&N Dec. 316 (A.G. 2018)

Interim Decision #3929

**Matter of A-B-, Respondent**

*Decided by Attorney General June 11, 2018*

U.S. Department of Justice  
Office of the Attorney General


- (1) *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.
- (2) An applicant seeking to establish persecution on account of membership in a “particular social group” must demonstrate: (1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership in the group is a central reason for her persecution. When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her.
- (3) An asylum applicant has the burden of showing her eligibility for asylum. The applicant must present facts that establish each element of the standard, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of those elements.
- (4) If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim.
- (5) The mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.
- (6) To be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum.
- (7) An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government’s difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.
- (8) An applicant seeking asylum based on membership in a particular social group must clearly indicate on the record the exact delineation of any proposed particular social group.
- (9) The Board, immigration judges, and all asylum officers must consider, consistent with the regulations, whether internal relocation in the alien’s home country presents a reasonable alternative before granting asylum.



U.S. Immigration  
and Customs  
Enforcement

July 11, 2018

MEMORANDUM FOR: All OPLA Attorneys

FROM:  for Tracy Short  
Principal Legal Advisor

SUBJECT: Litigating Domestic Violence-Based Persecution  
Claims Following *Matter of A-B-*

**Purpose**

This memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) attorneys litigating asylum and statutory withholding of removal claims in the wake of the Attorney General's (AG's) recent precedent decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G., 2018).<sup>1</sup>

**Background**

(b)(5)

[Redacted content]

(b)(5)

[Redacted content]

(b)(5)



(b)(5)

(b)(5)

(b)(5)

(b)(5)



(b)(5)

(b)(5)



(b)(5)



(b)(5)



## ASYLUM CONFIDENTIALITY ADVISAL

- The law strictly prohibits U.S. Government Executive Branch personnel from disclosing asylum-related information to unauthorized parties. *See* 8 C.F.R. §§ 208.6, 1208.6. Such disclosure might subject an alien applicant to retaliation if repatriated, or endanger family members and associates abroad.
- Even the simple confirmation of asylum-related information already made public by an alien applicant or other source is prohibited.
- In addition to asylum, information relating to overseas refugee status, statutory withholding of removal, Convention Against Torture protection, and the credible fear / reasonable fear processes should not be disclosed.
- Protected information includes any information that might lead to a “reasonable inference” that an alien has made such an application or is part of such a process, even if the word “asylum,” for example, is never used.
- The types of unauthorized parties are extensive, including, but not limited to: (i) foreign government agencies (save for those few party to specialized information sharing agreements with DHS); (ii) private individuals, including most family members (an alien applicant’s own attorney of record is not an unauthorized party); (iii) international organizations, including INTERPOL; (iv) state and local law enforcement; and, (v) under some circumstances, Members of Congress and other U.S. Government agencies (when such agencies do not have an official “need to know”). No disclosures may be made to such parties.
- If pressed by an unauthorized party for a reason for withholding information, simply state “general privacy restrictions.” Mentioning “asylum confidentiality” or the pertinent regulations, of course, would improperly reveal the protected basis of the information.
- When making an authorized disclosure to another DHS component or U.S. Government agency, please include this advisal, or otherwise convey the guidance contained in it, to ensure they properly protect the information.
- In addition to the asylum confidentiality regulations, other laws, such as the Privacy Act and the Violence Against Women’s Act (VAWA), may independently prohibit the disclosure of information.
- Please err on the side of caution when dealing with asylum confidentiality issues. If you have questions about potential restrictions or exceptions, please contact the ICE Office of the Principal Legal Advisor (OPLA) Immigration Law & Practice Division and Government Information Law Division, or your local ICE OPLA office.

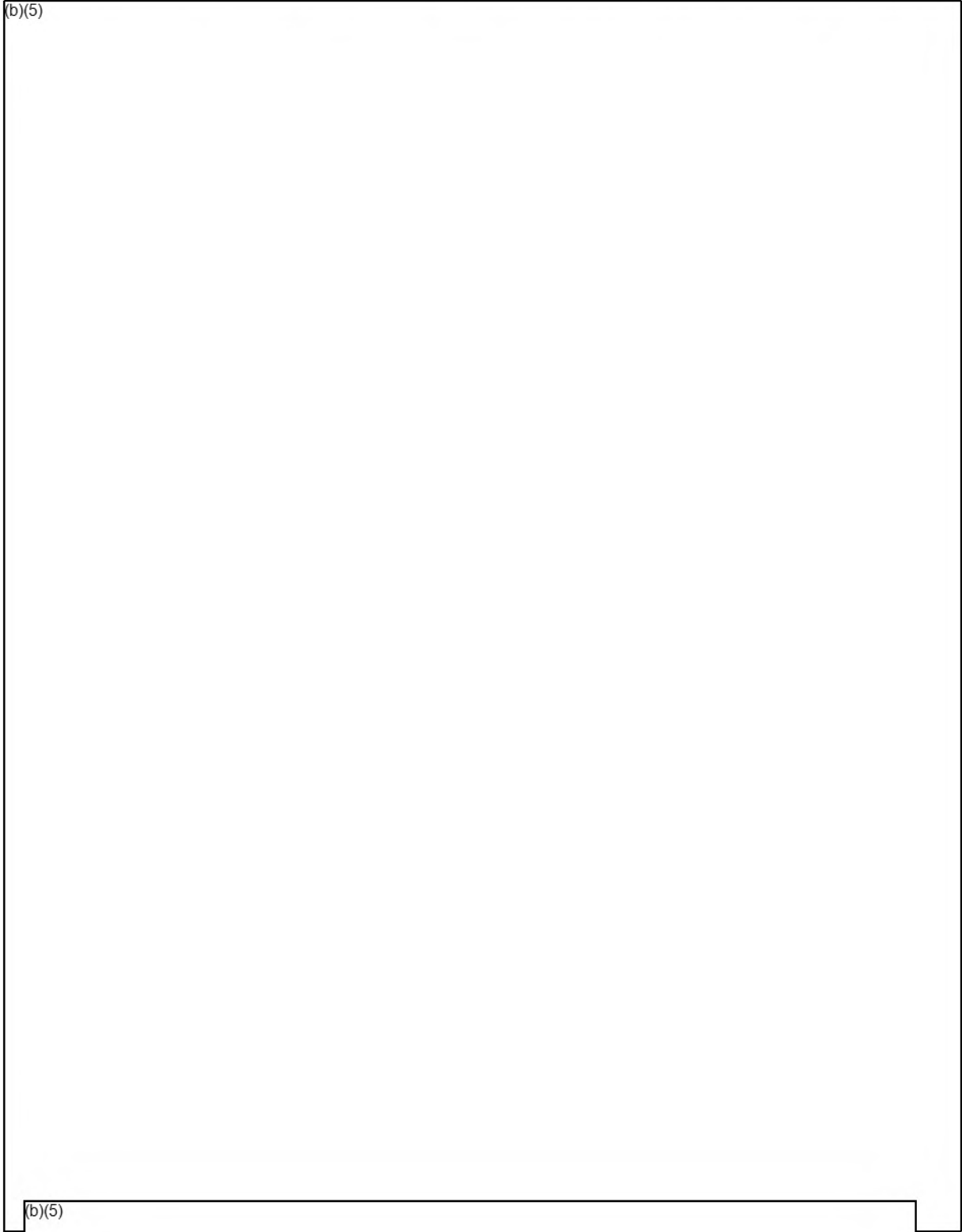
*This advisal is intended to provide only general informal guidance. It should not to be disseminated outside the U.S. Government. It does not create any enforceable legal right or private right of action.*



(b)(5)

**Lines of Questioning for Voir Dire or Cross-Examination of Expert**

(b)(5)



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## Resources for your trial notebook:

BIA precedent decisions based on topic: <https://www.justice.gov/eoir/bia-precedent-chart>

ILPD's SharePoint site (check out the Shared Documents link and the blog!)

(b)(7)(E)

ILPD's (b)(6); (b)(7)(C) -maintained OPLA Outlines, which is in the ILPD Share Document Folder, which is in the process of being migrated. You can find their OPLA Outlines folder here (as of 7/13/20):

(b)(7)(E)

The immigration consequences charts based on criminal convictions by state can be found at the top of the main Principal Legal Advisor SharePoint page at

(b)(7)(E)

OPLA policies can also be found at the top of the main Principal Legal Advisor SharePoint Page at

(b)(7)(E)

**27 Appendix**

*27.1 Inadmissibility Grounds and Waivers*

(b)(5)



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(b)(5)

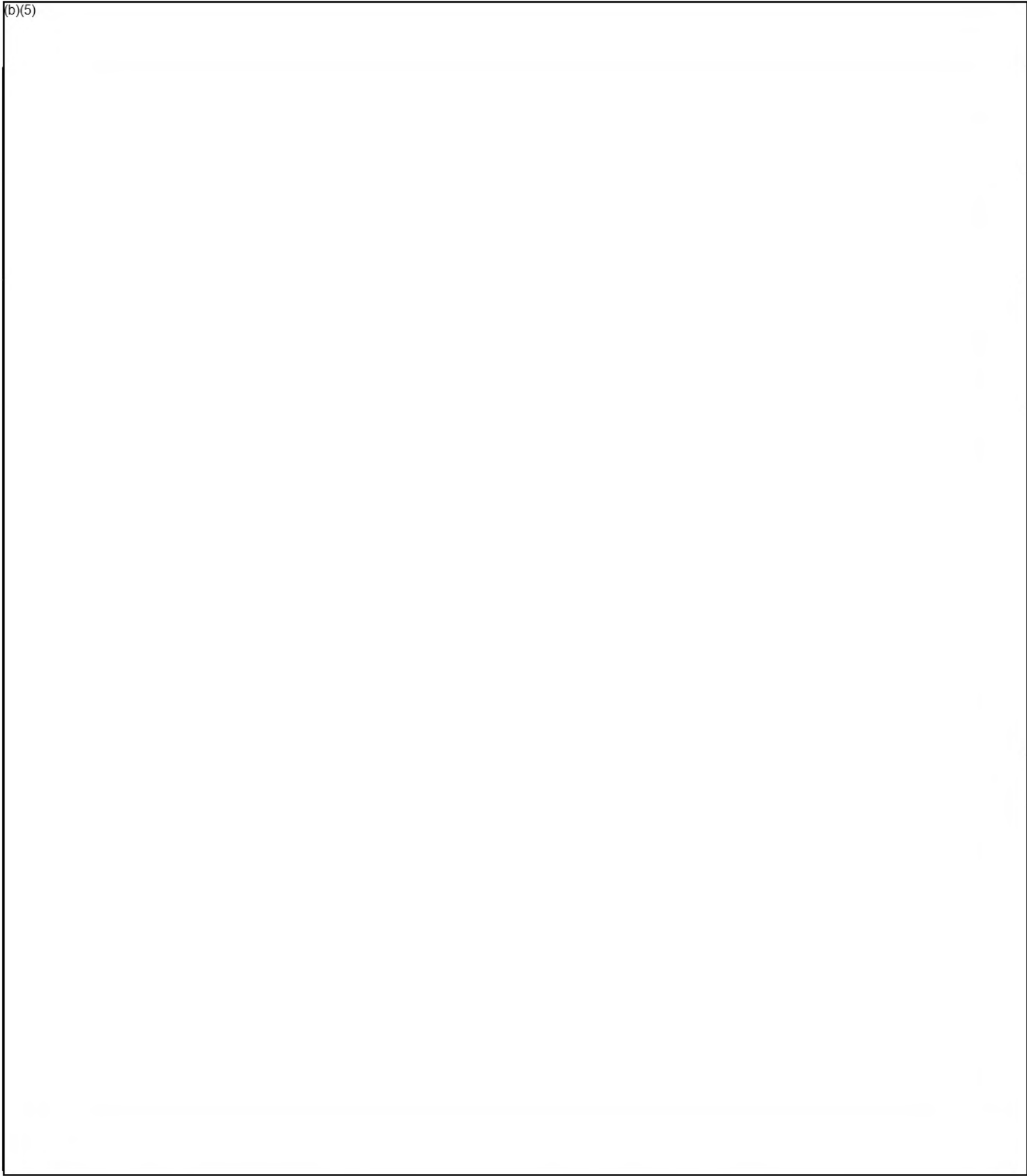
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*27.2 Burden Of Proof Chart*  
Judith Patterson



27.3 Relief From Removal (Post IIRAIRA) Checklist Chart

CHECKLIST: RELIEF FROM REMOVAL – Post – IIRAIRA

(b)(5)



(b)(5)

# OPLA 101 – Idea Hub

## December 2020 Session

### JUVENILES

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**Question:** *Is there still a one-year bar for asylum apps for UACs?*

**Response:** The one-year bar does not apply to UACs. See INA § 208(a)(2)(E).

### PRIVACY AND INFORMATION LAW

---

**Question:** *Are our notes taken on a notepad a government record to be preserved?*

**Response:** See separate GILD response sheet.

**Question:** *Are text messages on govt phone privileged?*

**Response:** See separate GILD response sheet.

### HUMAN RIGHTS VIOLATORS/HRVLD

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**Question:** *Where can we look to see if a person is a persecutor/human rights violator?*

**Response:** There is no one place to look, but HRVLD does offer country-specific resources on their SharePoint page in the shared library:

(b)(7)(E)

Also, if the Human Rights Violators and War Crimes Center has already identified an individual as a human rights violator, that information should be contained in HSI's ICM system and in PLANet (there is a "Human Rights (HR) Interest" box in PLANet that will be checked to help alert you).

OPLA attorneys are encouraged to seek advice and pointers from their local human rights point(s) of contact in their office. Questions can be directed to the HRVLD inbox at (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

### RELIEF IN GENERAL

---

**Question:** *What is the cap for COR again?*

**Response:** 4,000 per year (there is currently a backlog of about 1.5 years or so).

**Question:** (b)(5)

**Response:**

**Question:** (b)(5)

**Response:**

**Question:**

**Response:**

**Question:**

**Response:**

**Question:** Handout "Relief in General - 2" pg 12, there is a reference to a BOP Chart, but there is no BOP Chart. *Can you send that chart in another format or document?*

**Response:** Unfortunately, that chart is no longer available. The person who created it, has retired.

### **GUEST SPEAKER – DAVID PALMER**

---

**Question:** *David Palmer mentioned a second book to read. What is the title? the September 11th report?*

**Response:** Yes, he highly recommended reading The 9/11 Commission Report, formally named Final Report of the National Commission on Terrorist Attacks Upon the United States.

### **DATABASES**

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DOJ Case Alerts: <https://public.govdelivery.com/accounts/USDOJ/subscriber/new>

ICE

# ICE

# Protection Law:

# Technicalities

# Techniques

# Tips

(b)(6); (b)(7)(C)

**Associate Legal Advisor  
OPLA ILPD**



U.S. Immigration  
and Customs  
Enforcement

December 2020

## Prologue



- “[I]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.” *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997).
- **FACTS —► LAW = (hopefully) JUSTICE**



# ICE

## Session Road Map



## Where We're Going & Why



U.S. Immigration  
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Enforcement



## Session Topics



- **Part I:**
  - Quick Overview: 207 Refugee Status, Asylum, Statutory Withholding, and CAT
  - Bars
  - Credibility v. Corroboration
  - Concept of “Persecution”
  - Nexus
- **Part II:**
  - Convention Against Torture Issues
  - Particular Social Group Claims
  - Difficult Claim and the Collective Wisdom



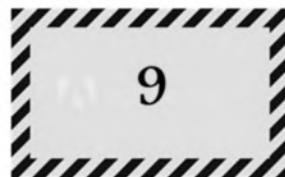
## Visual Aids



= INA § 207 Refugee,  
INA § 208 Asylum, and/or  
INA § 241(b)(3)  
Withholding of Removal



= CAT Withholding and  
Deferral of Removal  
(8 C.F.R. §§ 1208.16(c) -  
.18)



= 9th Cir. (b)(5)



# ICE

## Four Main Forms of Protection



- INA § 207 Overseas Refugee Admission;
- INA § 208 Asylum;
- INA § 241(b)(3) “Statutory” Withholding of Removal; and
- 8 C.F.R. §§ 1208.16(c)-.18 Convention Against Torture (“CAT”) Withholding and Deferral of Removal.



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## INA § 207 Overseas Refugee Admission



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## “Refugee” – INA § 101(a)(42)(A)



“[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”



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## INA § 208 Asylum



U.S. Immigration  
and Customs  
Enforcement

# ICE



## INA § 241(b)(3) “Statutory” Withholding of Removal



U.S. Immigration  
and Customs  
Enforcement

# ICE



## **8 C.F.R. §§ 1208.16(c)-.18 CAT Withholding and Deferral of Removal**



U.S. Immigration  
and Customs  
Enforcement



# ICE



## BARS, BARS, BARS . . .





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Enforcement

# ICE



## Two Types of Bars

- Bars to Applying for Protection 
- Bars to Receiving Grant of Protection 



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and Customs  
Enforcement

# ICE



## Bars to Asylum



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## Bars to *Applying* for Asylum

- Can be removed to a safe third country via a bilateral or multilateral agreement between the United States and other countries (aka “safe third country” or “asylum cooperative” agreements). INA § 208(a)(2)(A); 8 C.F.R. §§ 1208.4(a)(6), 1240.11(g) and (h).
- Failed to file an application within one year of last arrival in the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2). [*Mendez-Rojas* class action].
- Had a previous asylum application denied. INA § 208(a)(2)(C); 8 C.F.R. § 1208.4(a)(3).



## Bars to *Receiving* Grant of Asylum

- Involved in the persecution of others on account of protected ground. INA § 208(b)(2)(A)(i); 8 C.F.R. § 1208.13(c)(1).
- Convicted of a “particularly serious crime.” INA § 208(b)(2)(A)(ii); 8 C.F.R. § 1208.13(c)(1).
- Serious reasons for believing committed a “serious nonpolitical crime” outside the U.S. prior to arrival. INA § 208(b)(2)(A)(iii); 8 C.F.R. § 1208.13(c)(1).



## Bars to *Receiving* Grant of Asylum

- Reasonable grounds for regarding the alien as a danger to the security of the United States. INA § 208(b)(2)(A)(iv); 8 C.F.R. § 1208.13(c)(1).
- Involved in terrorist activity or with a terrorist organization. INA § 208(b)(2)(A)(v); 8 C.F.R. § 1208.13(c)(1).
- Firm resettlement in another country before arriving in the United States. INA § 208(b)(2)(A)(vi); 8 C.F.R. §§ 1208.13(c)(1) and .15.





## Recently Promulgated Bars to *Receiving Grant of Asylum*

- Subject to/violates proclamation/order issued under POTUS's INA §§ 212(f) or 215(a)(1) authorities on/after Nov. 9, 2018, suspending/limiting the entry of aliens along the southern border with Mexico. 8 C.F.R. § 1208.13(c)(3). [Enjoined (as of press time)]
- Enters, attempts to enter, arrives in United States across the southern land border on/after July 16, 2019, after transiting through a 3rd country, unless alien applied for protection in at least one transit country and received a final judgement. 8 C.F.R. § 1208.13(c)(4). [Vacated (as of press time)]



# ICE



## More Asylum Bars!

- *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020).  
[enjoined (as of press time)]
- Based upon INA § 208(b)(2)(C) and (d)(5)(B) (providing that the AG may by regulation establish additional limitations and conditions, consistent with this section, for consideration of an application for asylum, and under which an alien shall be ineligible for asylum).



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8 C.F.R. §§ 1/208.13(c)(6) would bar asylum eligibility due to following convictions:

- Relating to alien harboring, alien smuggling, and illegal reentry arising under INA § 274(a)(1)(A) or (a)(2), or INA § 276.
- Federal, State, tribal, or local crimes that the AG or Sec. knows/has reason to believe are connected to activity of criminal street gang as the latter term is defined in the pertinent jurisdiction.



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8 C.F.R. §§ 1/208.13(c)(6) also would bar asylum eligibility due to following convictions:

- DUI, irrespective of whether classified as a misdemeanor or felony, which caused serious bodily injury or death of another person.
- Second or subsequent DUI, irrespective of whether classified as a misdemeanor or felony.



# ICE

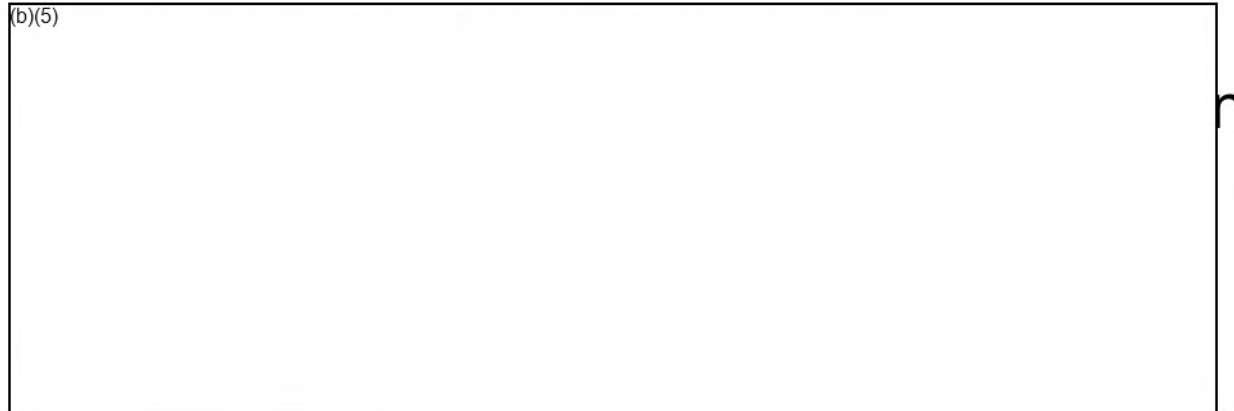


8 C.F.R. §§ 1/208.13(c)(6) also would bar asylum eligibility due to following convictions:

- Amounting to a crime of stalking, child abuse/neglect/abandonment, or domestic assault or battery offense, including specified DV crimes under federal, state, tribal, or local law, subject to certain exceptions.



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8 C.F.R. §§ 1/208.13(c)(6) also would bar asylum eligibility due to following convictions:

- Any felony under federal, state, tribal, or local law.
- Any misdemeanor under federal, state, tribal, or local law involving: (1) possession of false ID (unless related to fleeing country of claimed persecution); (2) receipt of public benefits; or (3) possession or trafficking of controlled substance or paraphernalia (other than a single personal possession offense involving 30 grams or less of marijuana).



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## Even More Asylum (and Withholding) Bars!!

- *Security Bars and Processing*, 85 Fed. Reg. 41201 (July 9, 2020) (*proposed rulemaking*).
- Rulemaking would clarify that aliens whose entry pose a significant public health danger due to the spread of serious communicable illnesses/diseases may constitute a “danger to the security of the United States” for purposes of the INA §§ 208(b)(2)(A)(iv) (asylum) and 241(b)(3)(B)(iv) (withholding) bars.



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## **Bars to Statutory Withholding and CAT Protection**



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## Bars to *Applying* for Statutory Withholding and CAT Protection

- Aliens ineligible to apply for asylum under INA § 208(a)(2)(A) safe third country bar are ineligible to apply for statutory withholding and CAT protection as well. 8 C.F.R. § 1240.11(g)(4) and (h)(2).



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## **Bars to *Receiving Grant of* Statutory Withholding and CAT Withholding**

- Involved in the persecution of others on account of protected ground. INA § 241(b)(3)(B)(i) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).
- Convicted of a “particularly serious crime.” INA § 241(b)(3)(B)(ii) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).
- Serious reasons for believing committed a “serious nonpolitical crime” outside the United States prior to arrival. INA § 241(b)(3)(B)(iii) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).



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## Bars to Receiving Grant of Statutory Withholding and CAT Withholding

- Reasonable grounds for regarding the alien as a danger to the security of the United States. INA § 241(b)(3)(B)(iv) (statutory withholding); 8 C.F.R. §§ 1208.16(d)(2) (statutory withholding and CAT withholding).
- **NOTE: No bars to receiving a grant of CAT deferral.** 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a) (an alien otherwise entitled to CAT withholding but subject to a mandatory bar “shall” be granted deferral of removal).



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## Bars & Burdens

- Burden of proof on alien to establish eligibility for asylum, statutory withholding, and CAT protection. See, e.g., INA §§ 208(b)(1)(B)(i) (asylum), 240(c)(4)(A) (relief and protection in general).
- If record “evidence indicates” that a ground for mandatory denial applies, the alien then has the burden of proving by a preponderance of the evidence that such ground does not apply. See 8 C.F.R. §§ 1240.8(d) (“relief” including asylum), 1208.16(d)(2) (statutory withholding and CAT withholding). See also *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).



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# “Credibility” *versus* “Corroboration”



*“It’s a bedtime story. It doesn’t need corroboration.”*

**Michael Massin, *The New Yorker***



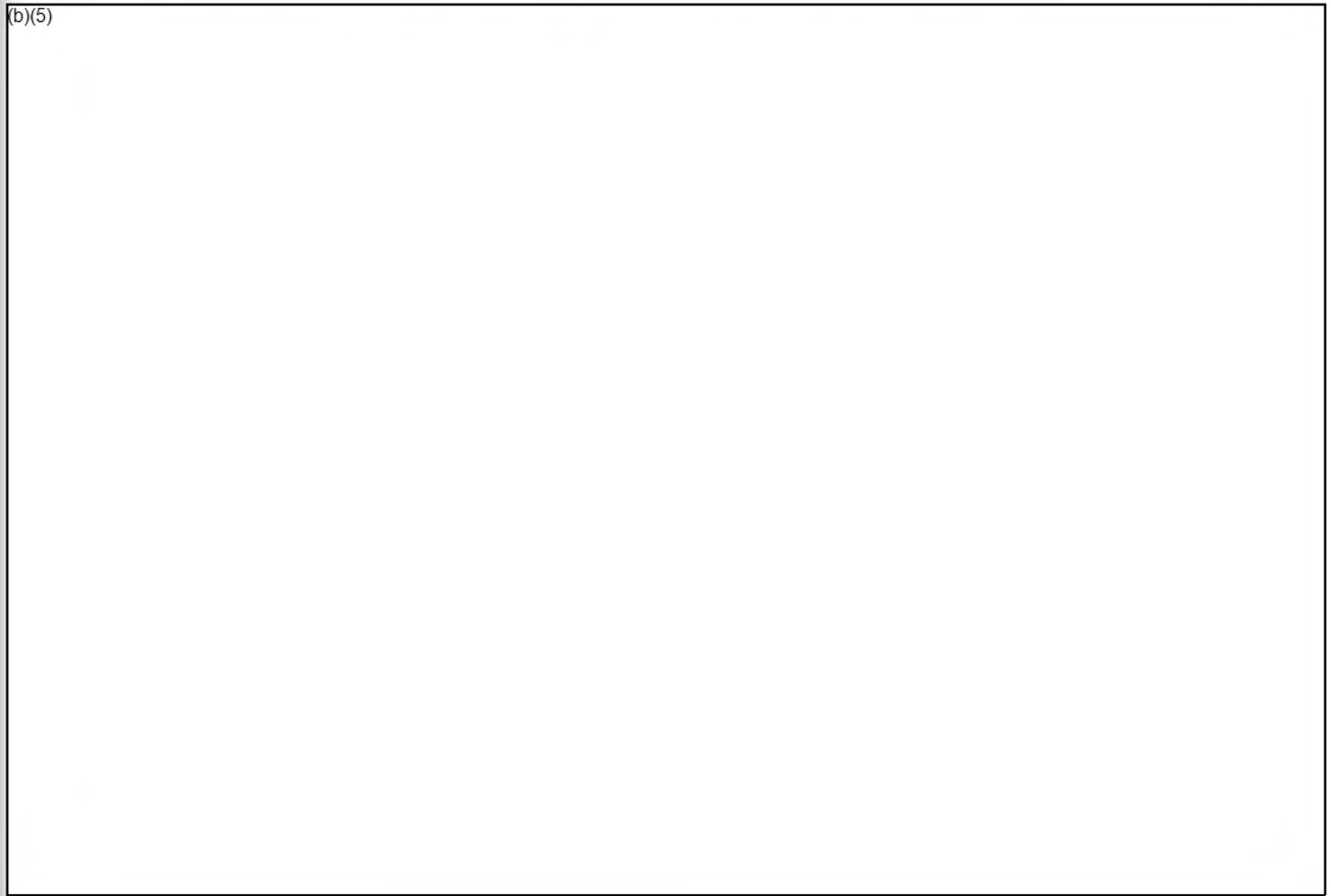
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## INA § 208(b)(1)(B)(ii)

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## INA § 208(b)(1)(B)(iii)



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## “Persecution” ????

Where do I find the definition?!



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# “Persecution”



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# Persecution and Children

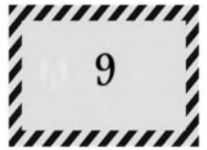


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## Nexus?



# Don't Forget It (or Any of the Other Requirements)!



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## Convention Against Torture

And where is that darn CAT provision in the INA?!



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## Convention Against Torture



- The CAT is a non-self-executing treaty. See, e.g., *Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007).
- *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA), Pub. L. No. 105–277, div. G, Title XXII, § 2242(b), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note): Congress directed agencies to “prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT] subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.”
- 8 C.F.R. §§ 1208.16(c) - .18.



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## Convention Against Torture



What is torture? *In part*, pursuant to 8 C.F.R. § 1208.18(a)(1):

- Any act by which **severe pain or suffering**, whether physical or mental, is **intentionally inflicted** on a person for such purposes as obtaining from him information or a confession, punishing him for an act that he has committed or is suspected of having committed, or for any reason based on discrimination of any kind, when such pain or suffering is **inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**



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## Convention Against Torture



- Evidence as to the risk of future torture, includes, but is not limited to:
  - Evidence of past torture inflicted upon the applicant;
  - Evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured;
  - Evidence of gross, flagrant, or mass violations of human rights within the country of removal; and
  - Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 1208.16(c)(3).



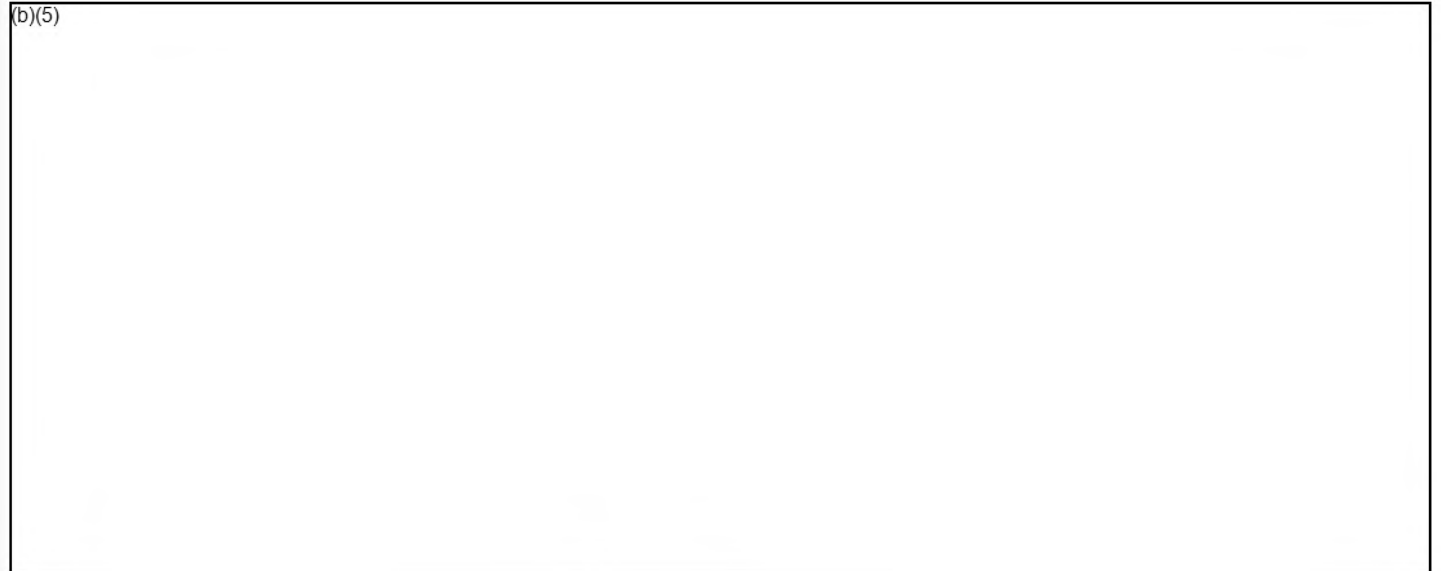
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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## CAT Claims: What's wrong with this sentence?



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## Particular Social Group



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## Particular Social Group

Three core requirements for a cognizable PSG:

- members share a common immutable characteristic;
- is defined with particularity; and
- and is socially distinct within the society in question.

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## Particular Social Group



- **Flash Test!** Are these PSGs cognizable????

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# ICE



## Difficult Protection Claim



*versus*



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## Difficult Protection Claim

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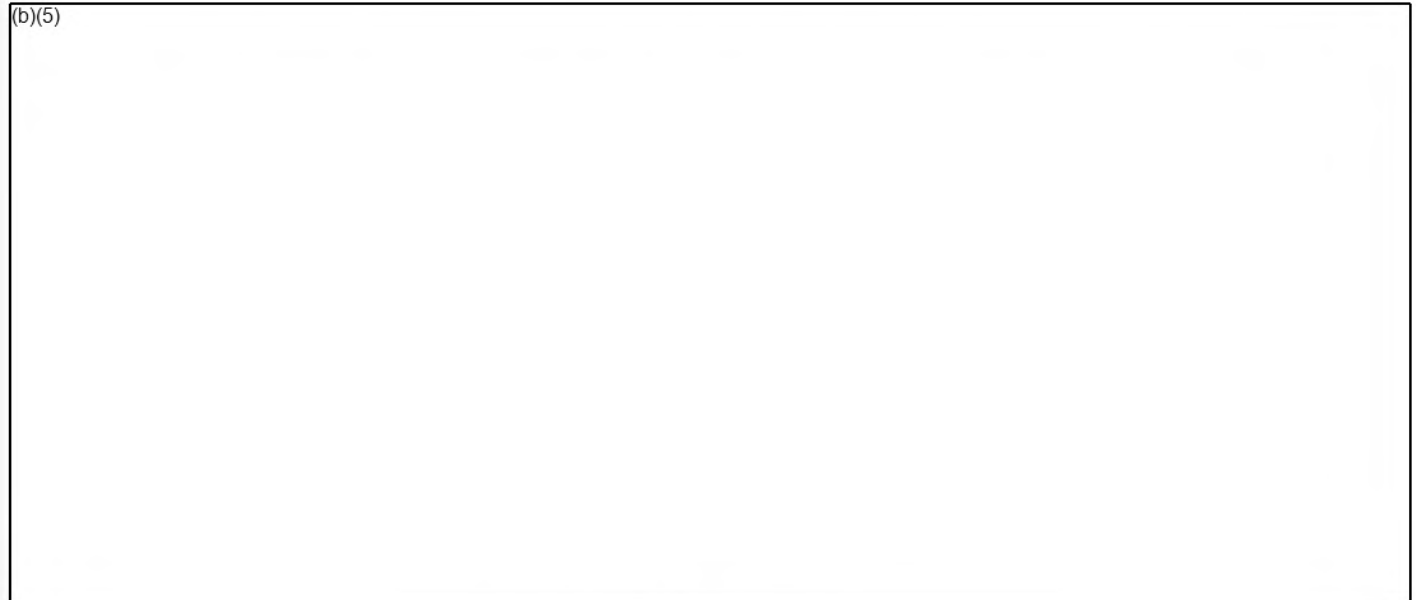
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## Difficult Protection Claim

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## Difficult Protection Claim

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## Difficult Protection Claim

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## Difficult Protection Claim

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## Difficult Protection Claim

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# Questions



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# ICE

# ICE

## Office of the Principal Legal Advisor

# Enforcement and Removal Operations Law Division (EROLD)

Presenter:

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, Deputy Chief



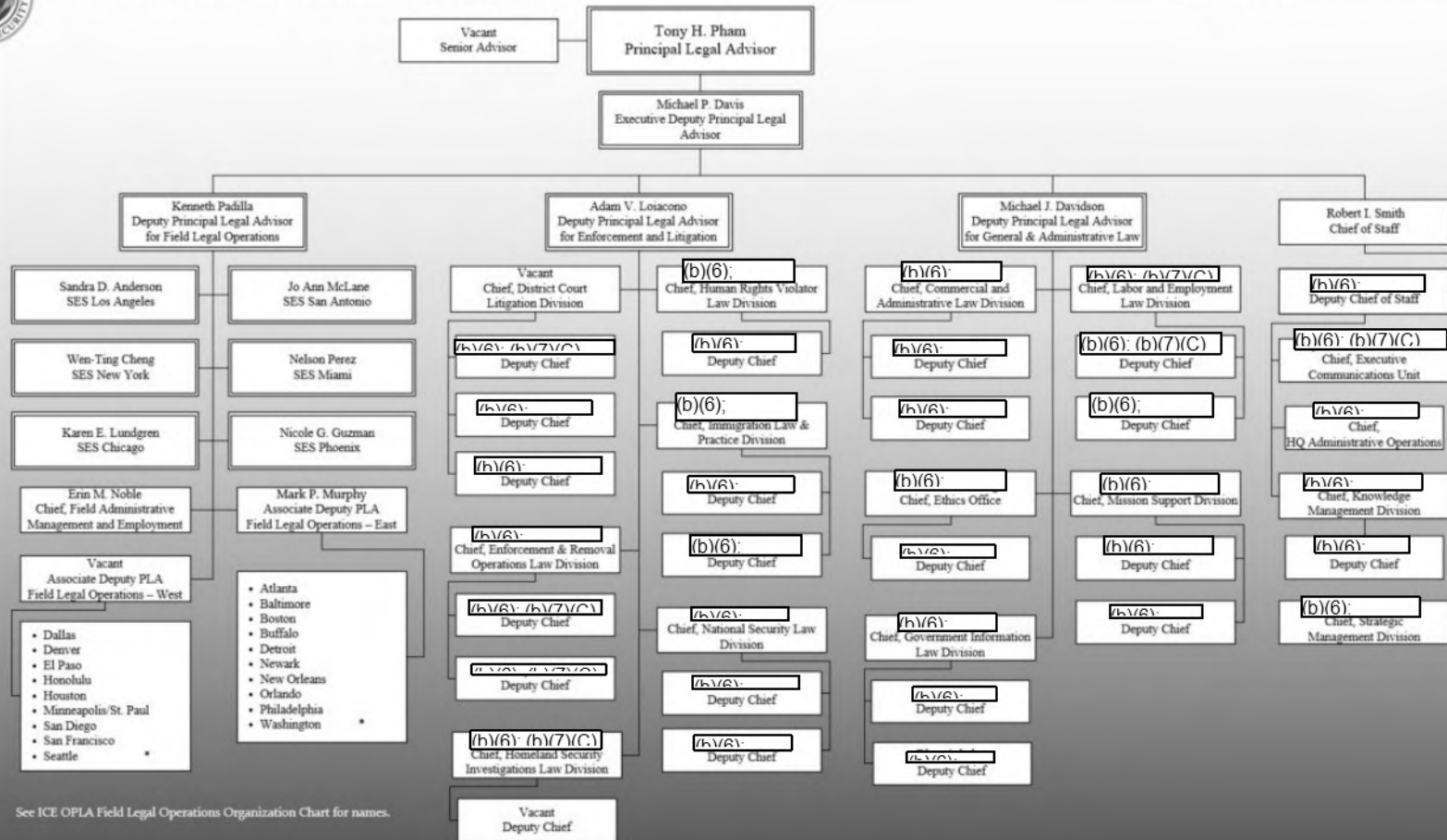
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## DHS ICE Office of the Principal Legal Advisor

July 2020



\* See ICE OPLA Field Legal Operations Organization Chart for names.



U.S. Immigration and Customs Enforcement

# ICE

## EROLD - Mission

- Provides legal advice and training to ERO Headquarters divisions:
  - Field Operations
  - Enforcement
  - Custody Management
  - Removal
  - ICE Health Service Corps



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## EROLD - Mission

On various issues, including:

- ERO's general arrest authority
- Fourth Amendment searches and seizures
- § 287(g) authority
- Detainers
- Visa Waiver Program
- Unaccompanied Alien Children
- Deferred Action



## EROLD - Mission

- Custody authority
  - Post-order Custody (POCR)
- Alternatives to Detention
- Conditions of Confinement
- Detainees with Disabilities
- Medical and Mental Health Care
- Hunger Strikes
- Removal strategies
- Impact of sanctuary laws and policies



## EROLD – Mission

- Provides legal and procedural guidance to the 25 OPLA Field Locations and other Headquarters components on matters in support of ERO operations in the field.
- Reviews U.S. citizenship claims memoranda elevated by OPLA Field Locations.
- Advises on Administrative Procedure Act compliance in support of ICE regulatory actions.



## EROLD in a nutshell

- EROLD SharePoint

- (b)(7)(E)

- EROLD duty box

- (b)(6); (b)(7)(C) @ice.dhs.gov
- Need to consult your management prior to writing





# ICE

## Identification and Apprehension of Removable Aliens

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# ICE

## Identification and Apprehension

- **Fugitive Operations:**
  - 129 Fug Ops teams nationwide
  - Locate, arrest and reduce population of at-large removable aliens within the United States
- **Criminal Alien Program (CAP):**
  - Biometric and biographic identification, arrest, and removal of priority aliens
  - Incarcerated aliens
  - At-large criminal aliens



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# ICE

## Secure Communities

- Executive Order 13,768, *Enhancing Public Safety in the Interior of the United States*
  - January 25, 2017
  - Terminated the Priority Enforcement Program (PEP)
  - Reinstated Secure Communities
- *Enforcement of the Immigration Laws to Serve the National Interest*
  - Former DHS Secretary Kelly's memorandum
  - February 20, 2017
  - Implemented EO 13,768



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## Secure Communities

- Uses “interoperability” (information sharing) between DHS’s and the Federal Bureau of Investigation’s (FBI) biometric systems to identify removable aliens booked into state and local law enforcement custody.
  - LEAs send the fingerprints of those booked into custody to the FBI.
  - FBI automatically sends fingerprints to DHS to check against its immigration databases.



# ICE

## Detainers

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## Detainers

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## Detainers

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## Juveniles

- Unaccompanied Alien Child (UAC) (6 U.S.C. § 279(g)(2))
  - Under 18
  - No legal status
  - No parent or legal guardian in the U.S. or no parent or legal guardian available to provide care and physical custody
- Minors
  - All others who are under 18
    - ◆ May have legal status
    - ◆ Or have a parent or legal guardian available





# ICE

# UAC

- Care and custody – Department of Health and Human Services. 6 U.S.C. § 279(a); 8 U.S.C. § 1232(b)(1).
- The Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA)

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- USCIS has initial jurisdiction over asylum applications, INA § 208(b)(3)(C).



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## Minors

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## Minors

- DHS and HHS final rule – “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” (August 23, 2019).
- Implements relevant provisions of the FSA, TVPRA, and the Homeland Security Act of 2002 (HSA).
- Enjoined September 27, 2019.
- To be continued....



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## Minors

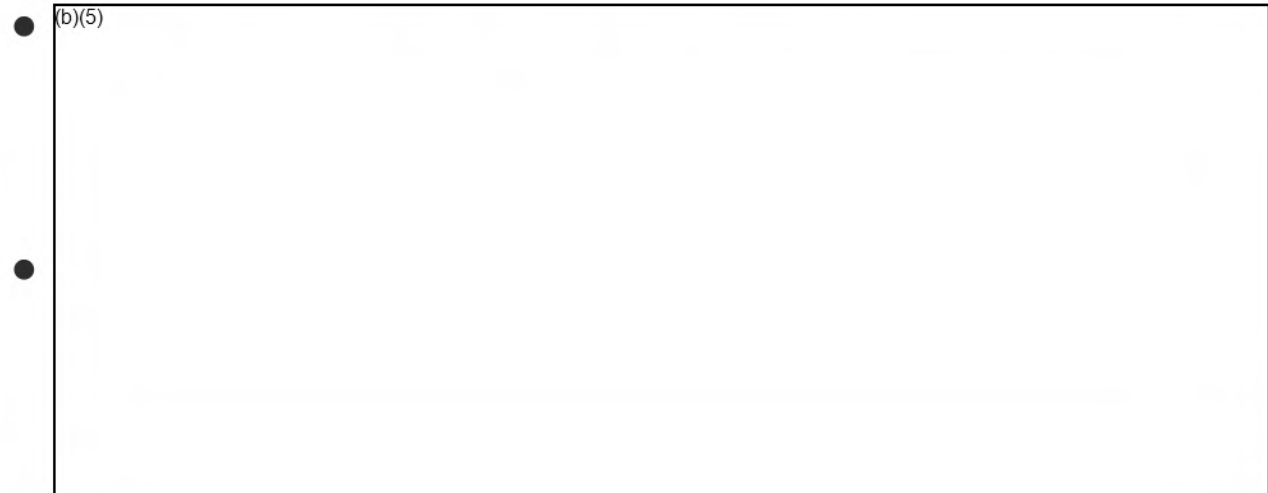
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## Family Custody

- ICE currently operates three family residential centers:
  - Texas –Dilley and Karnes
  - Pennsylvania – Berks County



# ICE

## Family Separation and the “Ms. L” Case

- On June 26, 2018, the U.S. District Court for the Southern District of California certified a class of detained alien parents and issued a nationwide preliminary injunction in the case of *Ms. L v. ICE.*, 310, F. Supp. 3d 1133 (S.D. Cal. June 26, 2018).



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## Family Separation and the “Ms. L” Case

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## Family Separation and the “Ms. L” Case

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## Family Separation and the “Ms. L” Case

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- Settlement agreement on EROLD SharePoint:

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## Detention Authorities

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## Detention Statistics

- Congress provides money for detention costs (approximately 42,000 beds)
- Average Daily Population – 48,555 (as of 2/18/2020) (FY2019 high was 56,226 on 8/8/2019)
- Detained in FY2019 – over 500,000 aliens
- Book-Ins – 32,815 (FY2020 as of 11/9/2019)
- Average Length of Stay – 52.3 days (FY2020 YTD) (historical average approx. 30 days)
- Average Cost to Detain – \$124.00 per day
- Detention Facilities – 250 (authorized)
- ATD – 93,571 aliens (as of 11/9/2019)



# ICE

## Immigration Detention Facilities

- **SPC** – Service Processing Center – a primarily ICE-controlled and -operated facility
- **CDF** – Contract Detention Facility – a facility that provides detention services under a competitively bid contract awarded by ICE.
- **IGSA** – Facilities that house ICE detainees – Governed by an Intergovernmental Service Agreement (includes wholly-dedicated IGSA)
- **IGA** – Facilities governed by an Intergovernmental Agreement (USMS facilities)
- **FRC** – Family Residential Centers (currently Berks, Dilley, and Karnes)



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## ICE Detention Policies

- ICE Policy No. 11064.2: *Detention and Removal of Alien Parents or Legal Guardians* (Aug. 29, 2017)
- ICE Policy No. 11022.1: *Detainee Transfers* (Jan. 4, 2012)
- ICE Policy No. 11065.1: *Review of the Use of Segregation for ICE Detainees* (Sept. 4, 2013)
- ICE Policy No. 11062.2: *Sexual Abuse and Assault Prevention and Intervention* (May 22, 2014)
- Further Guidance Regarding the Care of Transgender Detainees (June 19, 2015)
- ICE Policy No. 11032.3: *Identification and Monitoring of Pregnant Detainees* (Dec. 14, 2017)
- ICE Policy No. 11304: *Assessment and Accommodation for Detainees with Disabilities* (Dec. 15, 2016)



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## Non-IJ Removal Orders

- Visa Waiver Removal Orders
  - INA § 217; 8 C.F.R. § 217.4
  - Policy Number 11070.1: Visa Waiver Program Removals, dated February 18, 2016 (VWP Removal Policy).
- Expedited Removal Orders
  - INA § 235(b); 8 C.F.R. § 235.3
- Reinstatement of Removal
  - INA § 241(a)(5); 8 C.F.R. § 241.8
- Administrative Removal
  - INA § 238(b); 8 C.F.R. § 238.1
  - non-LPR aliens convicted of aggravated felonies



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## Visa Waiver Removal Orders

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## Expedited Removal

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## “Certain Other Aliens”

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## Past Designations of “Certain Other Aliens”

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## July 23, 2019 Designation

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## Implementation of 2-year Designation

- On October 2, 2020, ICE issued ICE Policy No. 11058.2: Superseding Implementation Guidance for July 2019 Designation of Aliens Subject to Expedited Removal (Oct. 2, 2020), which provides updated guidance on the manner in which ICE immigration officers will implement former Acting Secretary McAleenan's designation of certain aliens for expedited removal under section 235(b)(1) of the Immigration and Nationality Act (INA), see 84 Fed. Reg. 35,409 (July 23, 2019) (2019 ER Designation).



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## OPLA Review

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## Implementation Guidance

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## Discretion to Choose

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## Exceptions to ER

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## Credible Fear

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## Credible Fear

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## Credible Fear

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## Detention and Release Authority

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# ER Detention Authority

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## Parole Authority



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## Legal Landscape

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## Legal Landscape

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## Legal Landscape

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## Legal Landscape

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## Legal Landscape

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## Reinstatement of Removal

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## Reinstatement Process

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- (b)(5)



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## Administrative Removal

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## Admin. Removal Process

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## Admin. Removal Process

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## Admin. Removal Process

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## Admin. Removal Process

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## Reasonable Fear

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## Reasonable Fear

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## Reasonable Fear

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## Reasonable Fear

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- (b)(5)



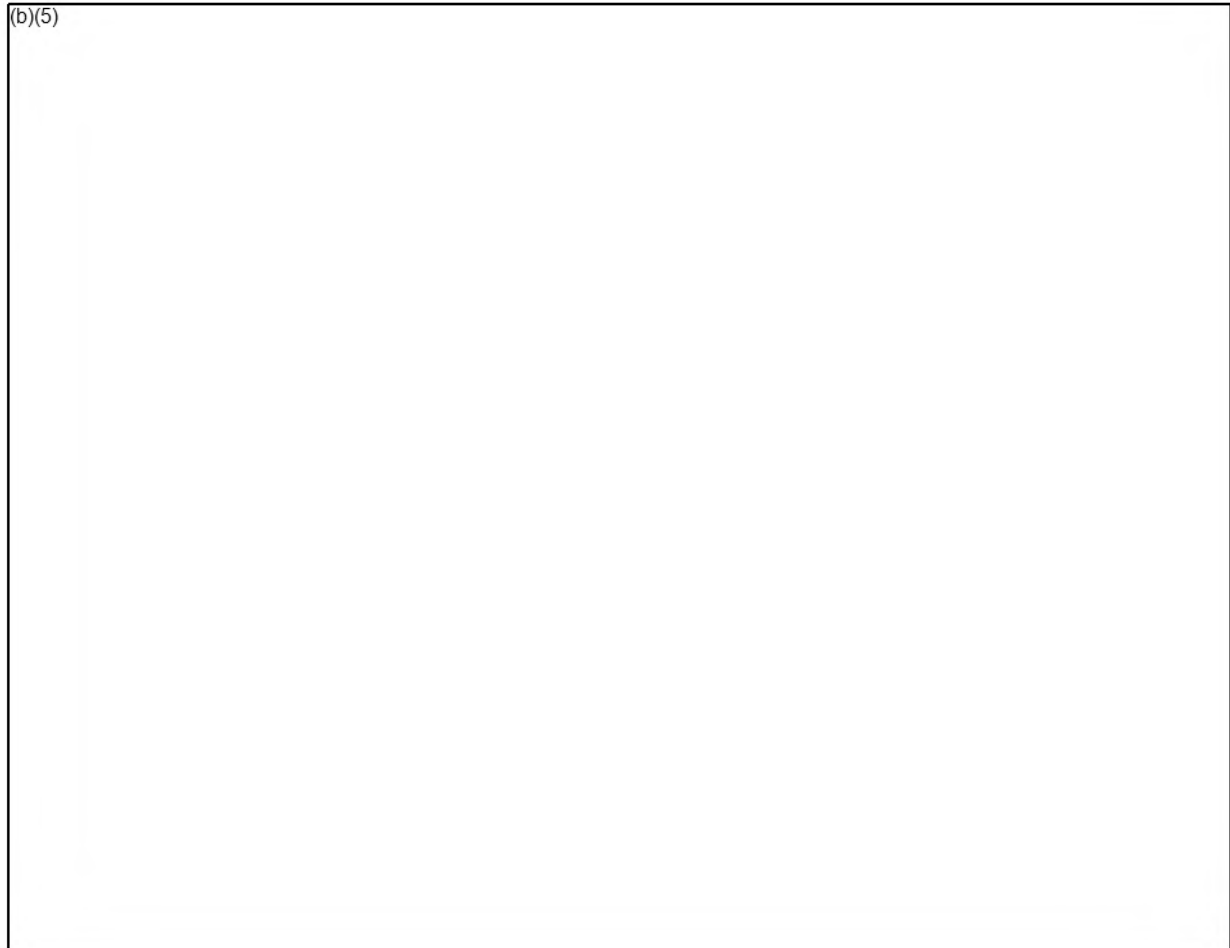
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## Detention and Release Authority



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## Detention and Release Authority

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## Post-order Custody

- Post-order Custody Authority
- Post-order custody review (POCR) process
- Failure to Comply
- Continued detention on account of special circumstances



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## INA § 241(a)

- The removal period. INA § 241(a)(1).
- Detention during the removal period. INA § 241(a)(2).
- Detention beyond the removal period. INA § 241(a)(6).
- Orders of Supervision. INA § 241(a)(3).



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## The Removal Period

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- (b)(5)



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## Mandatory or Discretionary

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## Administrative Finality of Removal Order

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## Automatic Stays

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## Automatic Stays

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## Forbearance Agreements

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## POCR Process

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## Interpreting INA § 241(a)(6) *Zadvydas v. Davis*, 533 U.S. 678 (2001)

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## Statutory Interpretation



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## Questions



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# Fraudbusters!



**Presenters.**

**DCC** (b)(6); (b)(7)(C), **New Orleans**

**HSI Unit Chief** (b)(6); (b)(7)(C) – **Forensic Laboratory**



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## A Circuit Court's View

“The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many asylum applicants fall prey.”

*Angov v. Holder*, 788 F.3d 893, 899 (9th Cir. 2015).





## Combating Fraud – Why is it important?

- “[I]mmigration-related fraud strikes at the heart of the country’s immigration laws and undermines the integrity of the entire system.” *Matter of Krivonos*, 24 I&N Dec. 292 (BIA 2007).
- Fraud hurts those going about the process honestly.
- It can become systemic and prevalent.



## Quick Overview



- Common Types of Fraud
- Fraud Detection Tools
- Fraud-Related Case Law



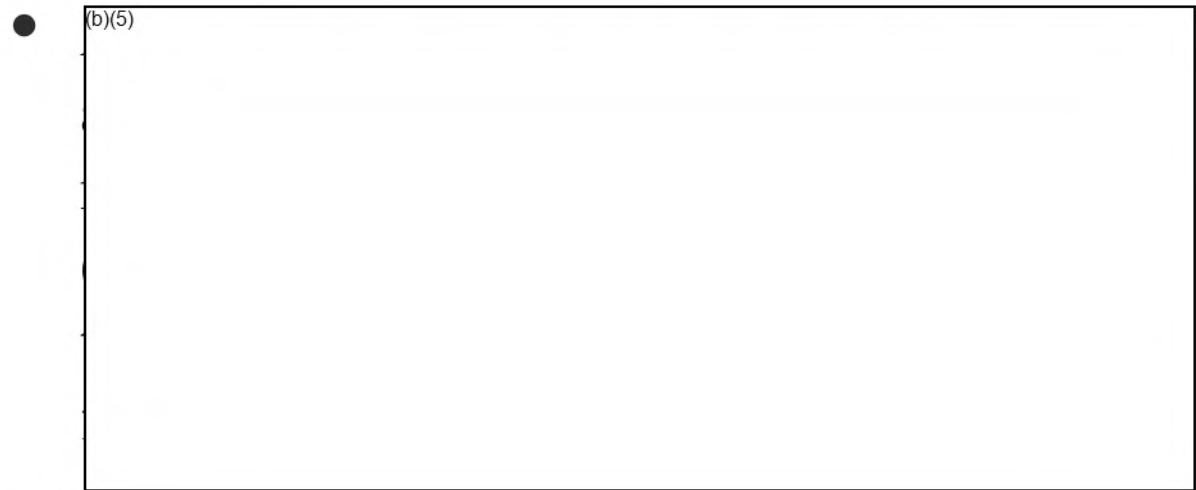
## Common Types of Fraud

- 
- Identity Fraud
- Asylum Fraud



## Identity Fraud

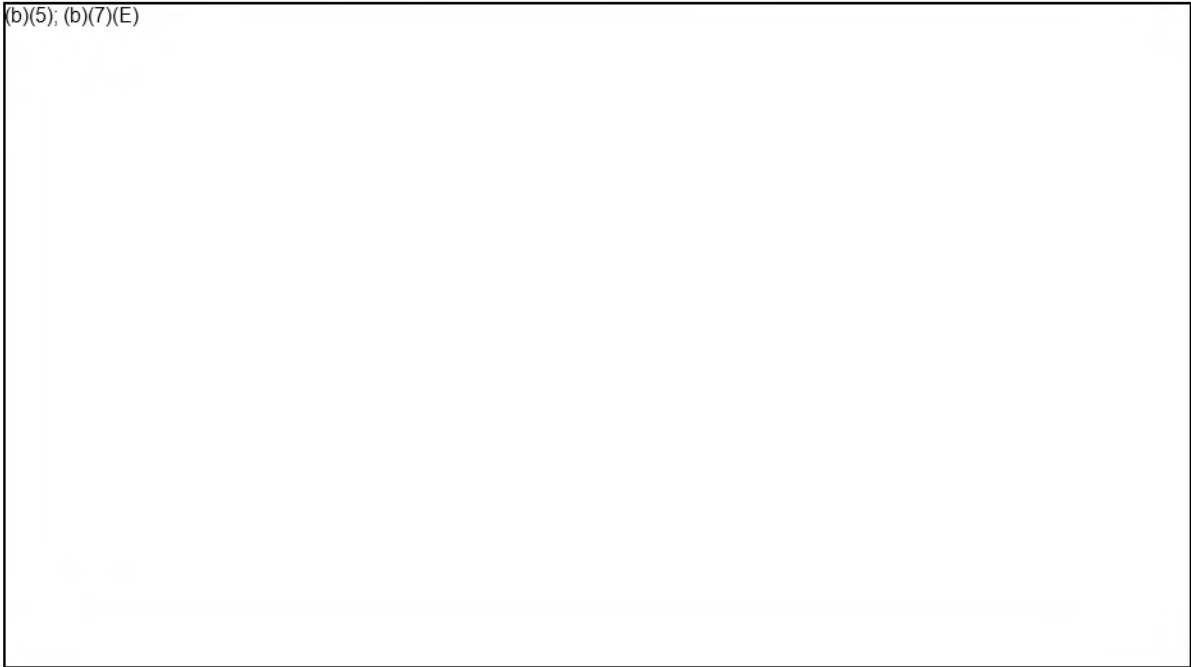
- Who IS this person???
- Fraudulent documents used for entry.



## Asylum Fraud

- **SOME THINGS TO LOOK FOR:**

(b)(5); (b)(7)(E)



## Tools To Combat Fraud

- “Asylum Fraud” Folder on ILPD SharePoint

- (b)(5); (b)(7)(E)

- (b)(5); (b)(7)(E)
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- OPLA Fraud POC
- ICE HSI Forensic Lab
- (b)(5); (b)(7)(E)
- USCIS FDNS
- USCIS Translation Unit



<http://web.stanford.edu/dept/CTL/cgi-bin/academicsskillscoaching/this-is-not-a-test/weightlifter/>



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## Comprehensive Database Searches

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## Overseas Investigations

In limited cases, OPLA attorneys may request assistance from U.S. Government personnel stationed abroad to investigate or verify aliens' applications for protection or their supporting documents.

### Five Fraud Referral Categories

- § Applicant encountered through DHS operation
- § One of ten or more cases showing fraud trend
- § Results reasonably likely to resolve claim of alien barred under INA §§ 208(b)(2), 241(b)(3)(B)(iii)
- § From special interest country with ID question
- § Non-confirmable political leadership position alleged



## Asylum Confidentiality

- **8 C.F.R. § 208.6**—Confidentiality is breached where the disclosure allows the third party to link the identity of the applicant to:
  - § 1) the fact that he has applied for asylum,
  - § 2) specific facts or allegations in the application, or
  - § 3) facts or allegations that give rise to a reasonable inference that he has applied for asylum.



## USCIS Translation Services Fraud Detection National Security Directorate

- USCIS Translation Services Section (NYC)
  - § Translation Services Request Form is available at ILPD SharePoint
- USCIS Fraud Detection and National Security Directorate (FDNS)
  - § Ensure immigration benefits are not granted to individuals who pose a threat or seek to defraud the immigration system
- HSI has the right of first refusal to investigate all FDNS fraud referrals.
- FBI – Operation Fiction Writer



## Termination of Asylum

- Asylum status may be terminated by either an asylum officer or an immigration judge depending upon which authority originally granted the claim. *Matter of A-S-J-*, 25 I&N Dec. 893 (BIA 2012).
- INA § 208(c)(2)(A)-(E); 8 C.F.R. §§ 208.24, 1208.24.



## A-Files of Family Members and Credibility

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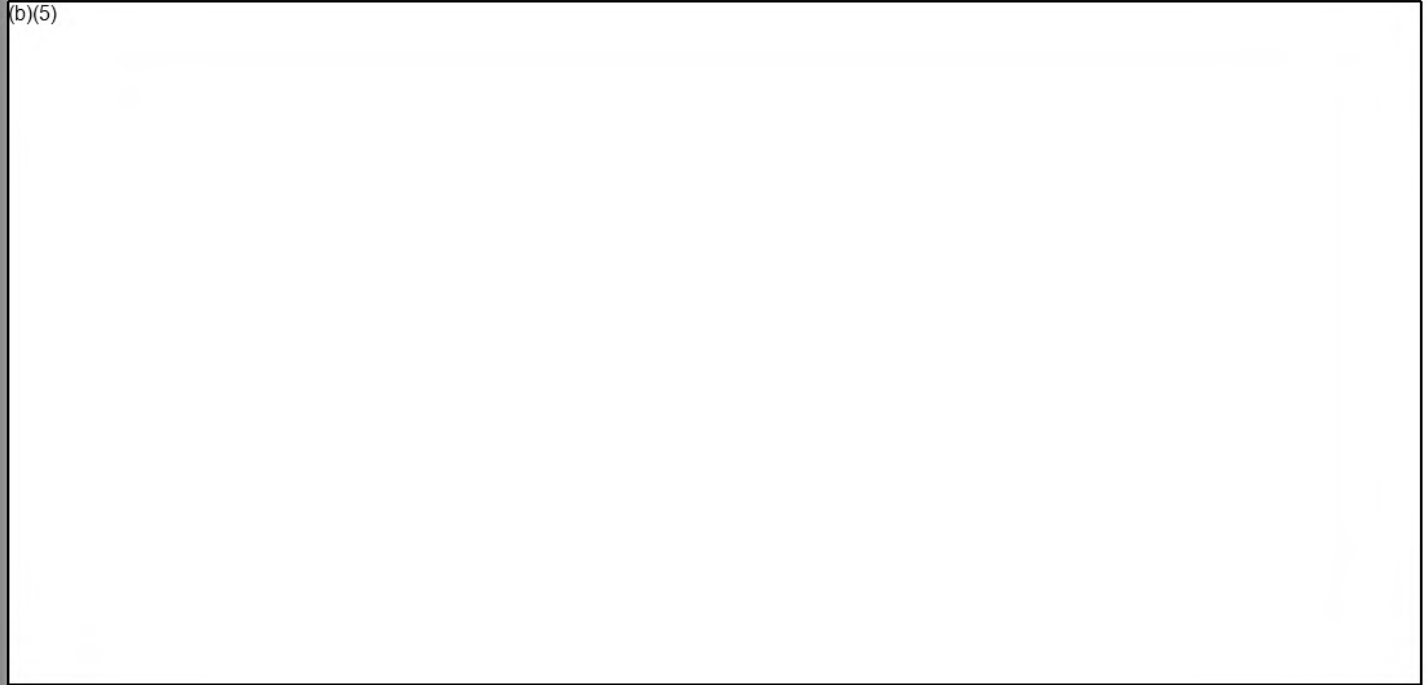


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## *Matter of R-K-K-, (Cont.)*

### **Procedural Safeguards**

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## *Matter of R-K-K-, (Cont.)*

The Board explained that this framework would permit IJs to draw reasonable inferences of falsity from inter-proceeding similarities while establishing procedural safeguards to protect faultless applicants.



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## Conclusion

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# Litigation Skills Pre-Exercise Reminders

**Presenter:**

(b)(6); (b)(7)(C)

**Deputy Chief Counsel  
OPLA Miami (PR & USVI)**



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## Why is Cross-Examination Important?

**“If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, “to tell the truth, the whole truth, and nothing but the truth,” and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to develop the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone.”**

**Francis Wellman, The Art of Cross-Examination (1903).**



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## Why is Cross-Examination Important?



Cross-examination is the most powerful tool that DHS can use in uncovering as much of the truth to compel the Immigration Judge to render the correct decision, and to establish the complete administrative record for review by the BIA and if necessary to the respective U.S Court of Appeals.



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## Before the 4Cs: The Basics

- A question that suggests the answer – usually answerable by yes or no.
- Each question should relate to the theme or theory of the case.
- Each question must be effective and efficient.
- Every question leads to a goal.
- One fact per question.
- Use witness' own words to control and refute.

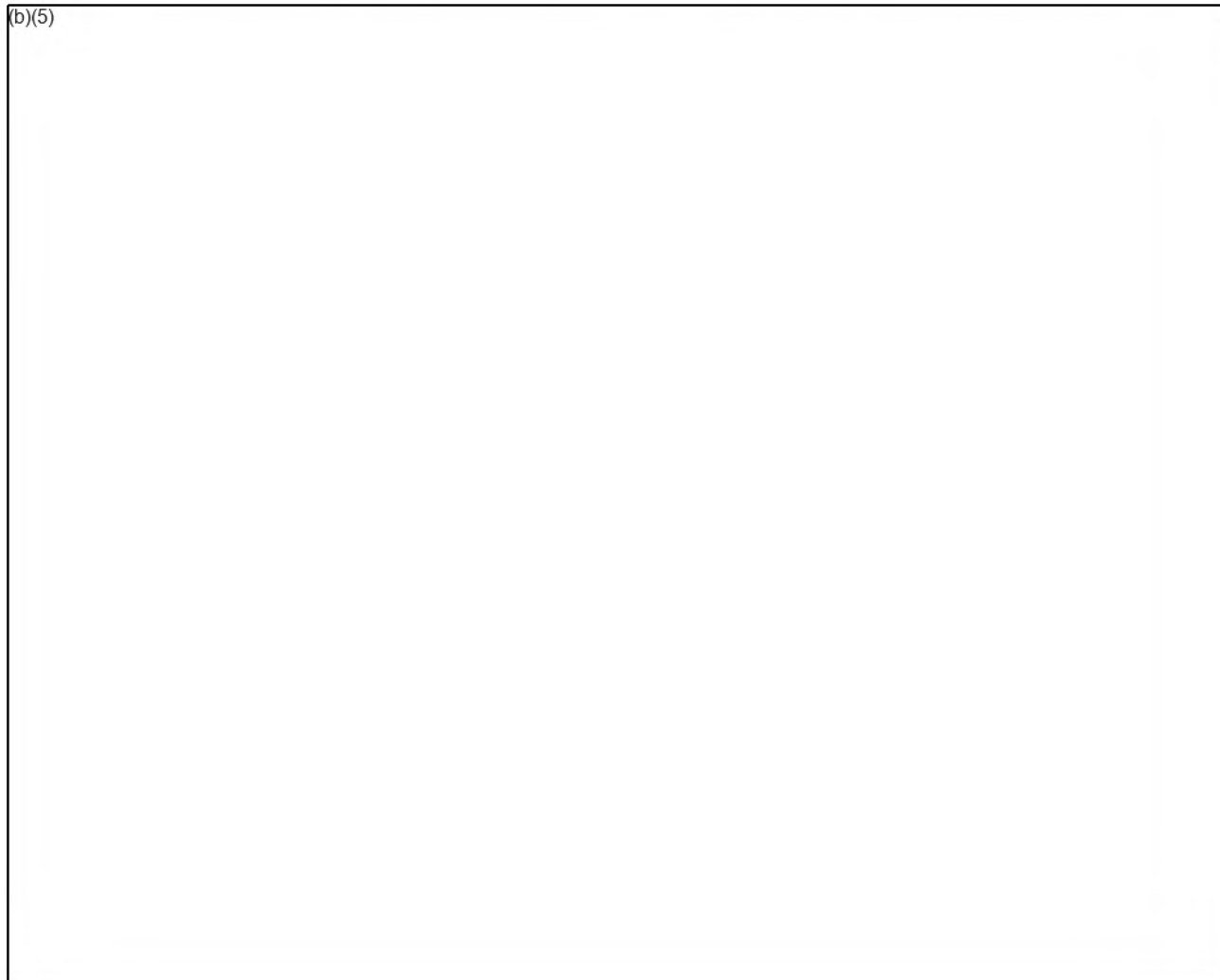


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## Non-Leading Questions



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## Four Categories of Cross Questions

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## Step 1: Concession-Based Examination

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## Concession Mechanics

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## Step 2: Clarify and Confirm the Witness' Testimony

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## Clarify and Confirm: Mechanics

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## Step 3: Color the Witness' Testimony

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## Coloring: Mechanics



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## Setting Up for Successful 4C Cross-Examination

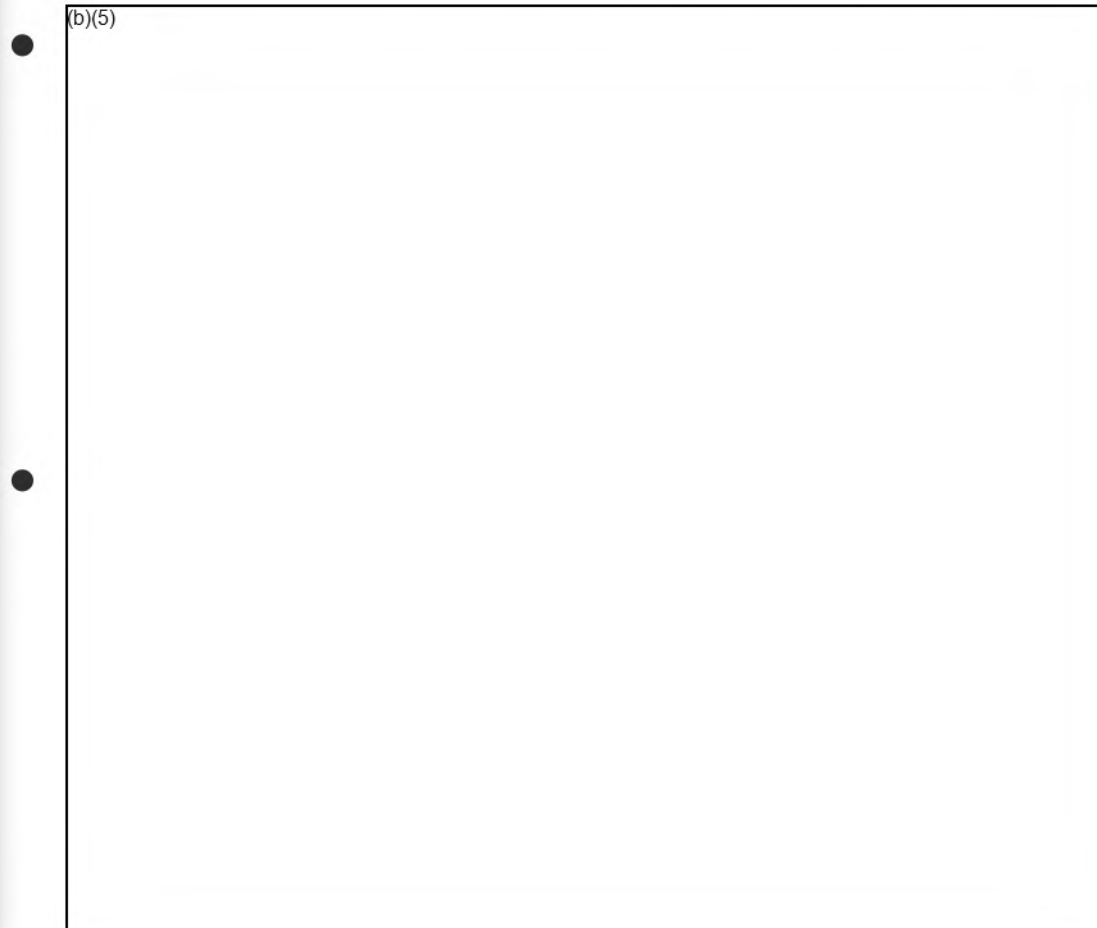
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## Example of a Poor Cross-Examination



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## Step 4: Confronting

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## Confronting: Mechanics

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## Order of Questioning

- Start strong and end strong.

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## Things to Remember

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# QUESTIONS?

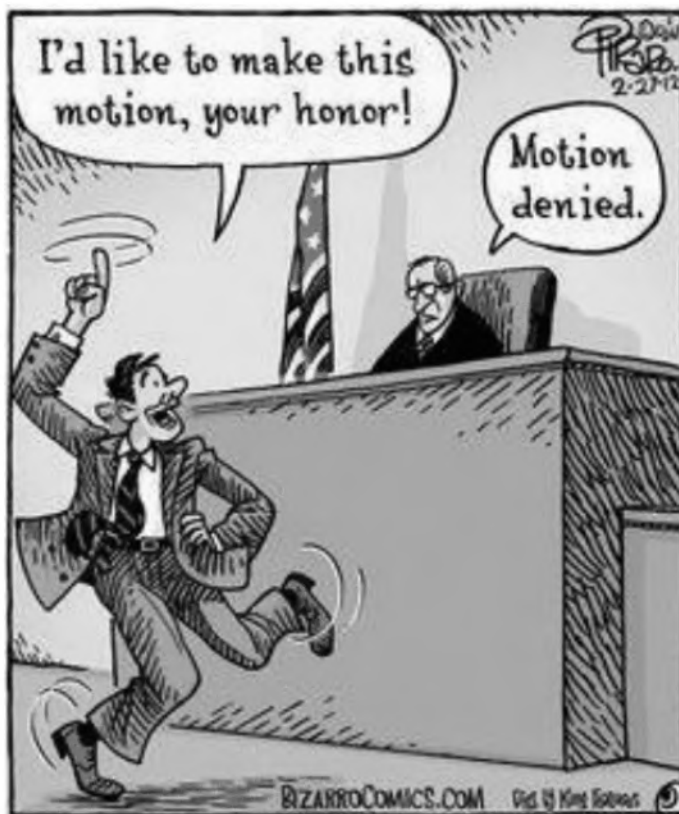


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## Motions Practice



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DCC Atlanta (Charlotte)

(b)(6); (b)(7)(C)

DCC Detroit

## What We Will Cover

- General Overview of Motions
- Legal and Operational Considerations for Most Common Motions
  - Motion to Change Venue
  - Motion to Reopen
  - Motion to Continue
  - Motion to Dismiss
- Strategies to Develop an Effective Motions Practice
- Capturing Motions in PLAnet



# ICE

## Welcome to the World of Motions

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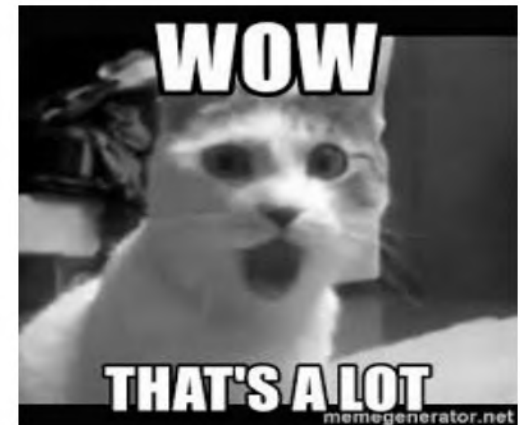
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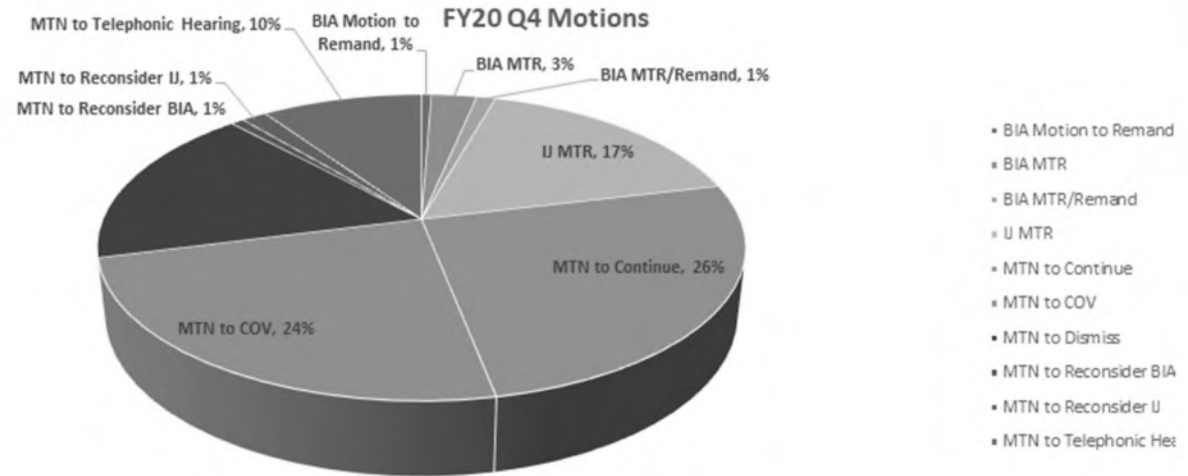
## How Many Motions Are We Talking About?

- In FY20 Q4 there were 44,875 motions recorded in PLAnet
- That's 14,958 motions per month
- 3,740 motions per week
- 748 motions per work-day!



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## Common Motions



| Row Labels                | Count of Action |
|---------------------------|-----------------|
| BIA Motion to Remand      | 124             |
| BIA MTR                   | 571             |
| BIA MTR/Remand            | 236             |
| IJ MTR                    | 3561            |
| MTN to Continue           | 5417            |
| MTN to COV                | 5080            |
| MTN to Dismiss            | 3629            |
| MTN to Reconsider BIA     | 162             |
| MTN to Reconsider IJ      | 314             |
| MTN to Telephonic Hearing | 2024            |
| <b>Grand Total</b>        | <b>21118</b>    |



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## Motion to Change Venue



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## Motion to Change Venue

- An immigration judge may change venue for **good cause** shown,
- which is determined by **balancing relevant factors**—such as administrative convenience, expeditious treatment of the case, and the cost of transporting witnesses or evidence to a new location.
- 8 C.F.R. § 1003.20(b)
- *Matter of Rivera*, 19 I&N Dec. 688, 690 (BIA 1988)
- *Matter of Rahman*, 20 I&N Dec. 480, 482-83 (BIA 1992).



## Motion to Change Venue

- DHS initiated when detainee is moved or previously non-detained alien is taken into custody by another AOR.

- (b)(5)



## Motion to Change Venue

- Immigration Court Practice Manual Chapter 5.10(c) outlines the court's requirements for a Motion to Change Venue
- This includes:
  - An admission or denial of the factual allegations and charge(s) in the NTA
  - A designation or refusal to designate a country of removal
  - A description of eligibility for relief from removal, if any
  - A detailed explanation of the reason for the request

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## Motions to Reopen:



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## Motions to Reopen Are Generally Disfavored

- The respondent bears the very heavy burden of establishing that her case should be reopened. *Matter of S-Y-G-*, 24 I&N Dec. 247, 254 (BIA 2007).
- Motions to reopen are “plainly disfavored.” *Maatougui v. Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992).
- Motions to reopen “are particularly disfavored in immigration matters.” *Gurung v. Ashcroft*, 371 F.3d. 718, 722 (10th Cir. 2004); *S-Y-G-* 24 I&N Dec. at 252.





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## Motions to Reopen Are Generally Disfavored

- “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases....” See *Maatougui*, 738 F.3d at 1239 (quoting *INS v. Abudu*, 485 U.S. 94 (1988) (internal citations and quotations omitted)).
- Motions to reopen are especially disfavored in immigration matters where “every delay works to the advantage of the deportable alien.” *INS v. Doherty*, 502 U.S. 314, 323 (1992).



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## Motions to Reopen: Jurisdiction

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## Motions to Reopen: Burdens and Timeliness

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## Motions to Reopen: Burdens and Timeliness

- Timeliness:

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## Motions to Reopen: Departure Bar

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## Motions to Reopen: Departure Bar

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## Motions to Reopen: Departure Bar

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## Motions to Reopen: In Absentia Orders of Removal

- The respondent can move to reopen to rescind an order under limited circumstances. 8 C.F.R. § 1003.23(b)(4)(ii)
- The bases for reopening are:
  1. Lack of Notice
  2. Exceptional Circumstances
  3. State or Federal Custody



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## Motions to Reopen: Stay of Removal

- INA § 240(b)(5)(C) and 8 C.F.R. § 1003.23(b)(4)(ii) require a stay of removal based on one of the previous 3 bases

- Numerical

- Practice requires that you notify the ERO in order to qualify for a stay of removal

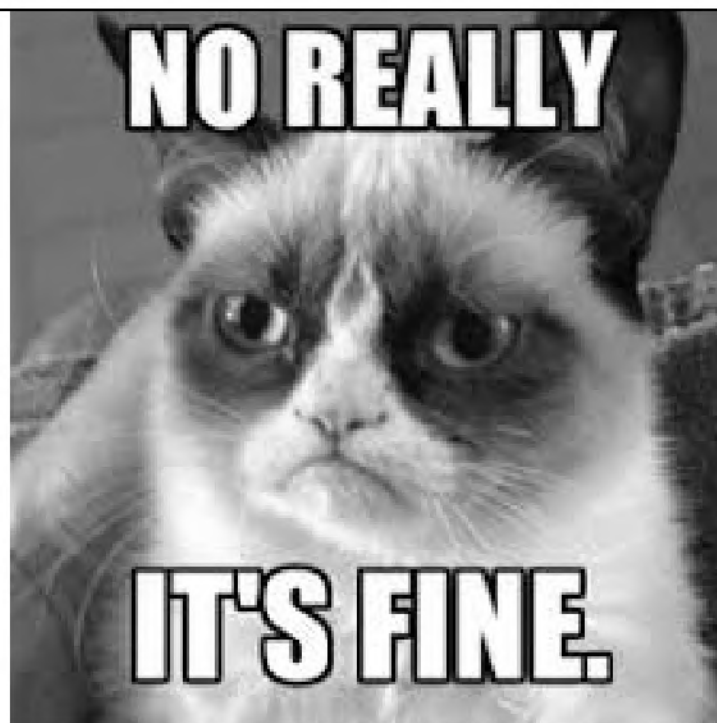
- The Court has held that an IJ's order to remove an individual between the time of the filing of a motion to reopen and the time of the removal is not stayed in absentia. 8 C.F.R. § 1003.23(b)(4)(ii)

- Thus, even when the motion is explicit as to the reason for reopening, 8 C.F.R. § 1003.23(b)(4)(ii), an automatic stay is likely in effect.



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## Motions to Reopen: Sua Sponte Reopening

- Both IJs and the Board have “limited discretionary power” to reopen a decision on their own motion, i.e., *sua sponte*. See 8 C.F.R. §§ 1003.23(b) (IJ), 1003.2(a) (BIA)
- **Reopening Based on New Authority:**
  - In order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board to reopen or reconsider a case *sua sponte*, the change must be **recent**, **fundamental** in nature and **not merely an incremental development** in the state of the law. See *Matter of X-G-W-*, 22 I&N Dec. 71, 71-74 (BIA 1998); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999).



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## Sua Sponte Motions to Reopen: New Authority

- By way of example, the Board has previously concluded that the Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254 (2013), was not a fundamental change in the law. See *Barajas-Salinas v. Holder*, 760 F.3d 905, 907 (8th Cir. 2014) ("The Board was not persuaded that the publication of *Descamps* was the kind of fundamental change in law for which sua sponte reopening is warranted.").
- Practice Pointer: IJs only have sua sponte authority to reopen, not to rescind an order. Watch for this language in in absentia MTRs!



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## Sua Sponte Motions to Reopen: New Authority

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## Sua Sponte Motions to Reopen: Vacatur

- In *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. Oct. 25, 2019), the Attorney General ruled that “for reasons similar to those explained in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev’d on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), (b)(5)

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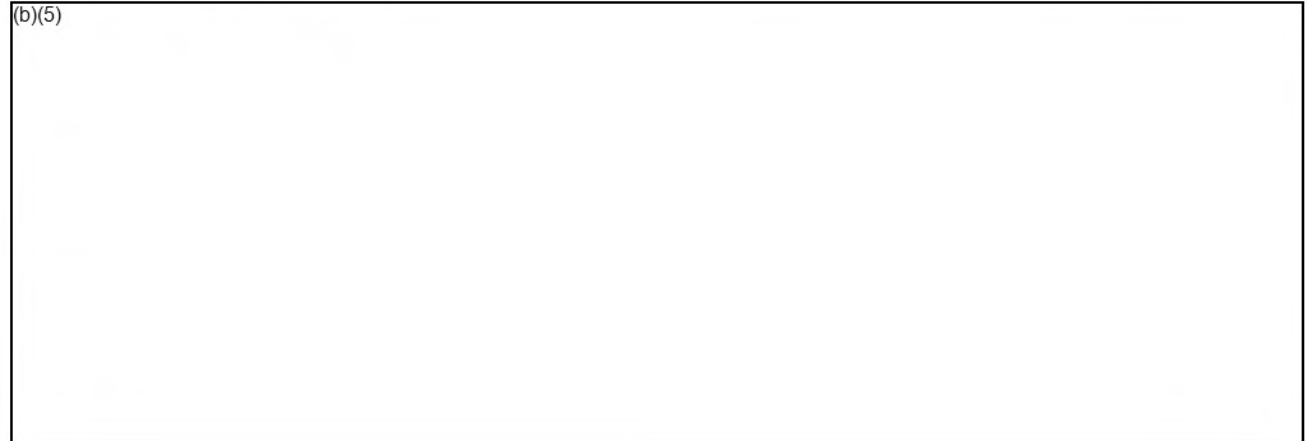


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## DHS Motions to Reopen: Asylum Termination

- DHS is not subject to the time and numerical limitations on motions to reopen in removal proceedings, or in exclusion or deportation proceedings based on “fraud in the original proceeding or a crime that would support termination of asylum.” 8 C.F.R. §§ 1003.2(c)(3)(iv), 1003.23(b)(1).

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## DHS Motions to Reopen: Asylum Termination

- “[O]rdinarily issues of removability and eligibility for relief from removal should be deferred until a threshold determination is made regarding the termination of asylum status.” *V-X-*, 26 I&N Dec. at 149.
- DHS bears the burden of proving, by a preponderance of the evidence, one or more of the grounds for termination set forth in 8 C.F.R. § 1208.24(a).



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## Motions to Continue:

- *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018):
  - The regulation governing continuances authorizes an IJ to grant a motion for continuance only “for good cause shown.” 8 C.F.R. § 1003.29.
  - The “good-cause” standard is a substantive requirement that limits the discretion of IJs and prohibits them from “granting continuances for any reason or no reason at all.” *Id.* at 406.



## Motions to Continue:

- IJs should continue applying a multifactor analysis, as directed by the Board in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), but that the principal focus should be on:
  - (1) The likelihood that the alien will receive the collateral relief, and
  - (2) Whether the relief will materially affect the outcome of the removal proceedings. *L-A-B-R-*, 27 I&N Dec. at 413.
- The IJ should also consider whether the alien has exercised reasonable diligence in pursuing that relief, DHS's position on the motion, the length of the requested continuance, and the procedural history of the case. *Id.*
- In assessing these factors, the IJ should also remain mindful that as the party seeking the continuance, the alien bears the burden of establishing good cause. *Id.*



## Motions to Continue:

- *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020):
  - In the context of an application for collateral relief,
    - ♦ Prima facie eligibility and
    - ♦ Whether it will materially affect outcome are not dispositive.
  - “Relevant secondary factors” must be considered.
    - ♦ Lack of due diligence.
    - ♦ DHS’s opposition.
    - ♦ Concerns re: administrative efficiency.



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## Motions to Continue: Status Dockets

- If an IJ sets a case for a status docket, please continue to follow previously disseminated status docket guidance.
- During the hearing, prompt the IJ so that his or her reasoning is on the record—and if the rationale is based on “good cause,” ensure that it complies with *L-A-B-R-*.
- If you receive a hearing notice that a case is set on a status docket, without the opportunity to present DHS’s position during a hearing, consider filing a motion to reconsider. See 8 C.F.R. § 1003.23.
  - In a motion to reconsider, specify the errors of fact and law, and request that the IJ provide an analysis of the AG’s multifactor balancing test supporting a finding of good cause. *Id.*



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## Motions to Terminate & Dismiss



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## Motions to Terminate & Dismiss

- *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018):
  - IJs have the authority to dismiss and terminate removal proceedings under certain defined circumstances, however, they do not have an inherent authority to terminate or dismiss removal proceedings.
  - Accordingly, IJs may not terminate or dismiss proceedings for reasons other than those expressly set out in the relevant regulations or where DHS has failed to sustain the charges of removability. *Id.* at 463.



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## Motions to Terminate & Dismiss

- Initiation of Proceedings:
  - The INA vests DHS with the exclusive authority to place aliens in removal proceedings by issuing, serving, and filing a NTA, which will identify the charges against a respondent. INA §§ 239(a), 240(a); 8 C.F.R. § 1003.14(a).



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## Motions to Terminate & Dismiss

- DHS may unilaterally cancel a NTA under certain enumerated circumstances before jurisdiction vests with the IJ under 8 C.F.R. § 239.2 (a).
  - (1) The respondent is a national of the United States
  - (2) The respondent is not deportable or inadmissible under immigration laws
  - (3) The respondent is deceased;
  - (4) The respondent is not in the United States;
  - (5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
  - \* (6) The notice to appear was improvidently issued, or
  - \* (7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.



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## Motions to Terminate & Dismiss

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## Motions to Terminate & Dismiss:

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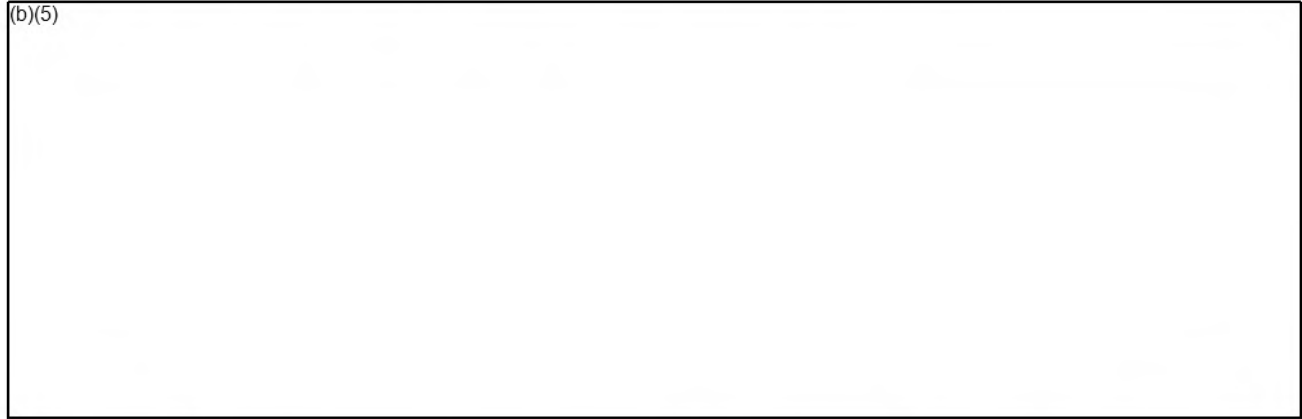
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## Recent-ish Case Law Updates Related to Termination

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## Recent-ish Case Law Updates Related to Termination

- *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018):
  - Distinguishing *Pereira*, the Board held that consistent with current court practices, a NTA that does not specify the time and place of an alien's initial removal hearing vests an IJ with jurisdiction over the removal proceedings and meets the requirements of INA § 239(a), so long as a notice of hearing specifying this information is later sent to the alien.
  - The Board validated the two-step process for initiating removal proceedings:
    - ♦ (1) DHS properly serves the respondent with an NTA containing all the proper advisals, but also indicates that the time and place of the respondent's hearing will be provided later by mail; and
    - ♦ (2) the EOIR properly sends the respondent a notice of the time and place of the hearing.



## Recent Case Law Updates Related to Termination

- *Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019) (en banc):
  - Clarifying the applicability of the stop-time rule under INA § 240A(d)(1)(A) in light of *Pereira* and *Bermudez-Cota*, the majority held that the notice requirements of INA § 239(a) are satisfied when a NTA that does not include the time and place of the alien’s initial removal hearing is followed by subsequent service of a notice of hearing specifying the missing information. Thus, when filed within the relevant statutory period, the hearing notice triggers the “stop-time” rule under INA § 240A(d)(1)(A).
- *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019):
  - Neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien did not appear at a scheduled hearing after being served with a NTA that did not specify the time and place of the initial removal hearing, so long as a subsequent notice of hearing specifying that information was properly sent to the alien.
- *Matter of Renata Miranda-Cordiero*, 27 I&N Dec. 551, 551 (BIA 2019):
  - Neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien who was served with a NTA that did not specify the time and place of the initial removal hearing failed to provide an address where a notice of hearing could be sent.



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## Recent Case Law Updates Related to Termination

- *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020).
  - Holding that the regulations requiring the inclusion of the address of the Immigration Court where the NTA will be filed set forth “internal docketing rules” or “claims processing rules” and that an NTA that lacks the address of the Immigration Court does not deprive the court of jurisdiction.
  - Respondents would need to establish prejudice caused by violation of these rules.



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## Recent Case Law Updates Related to Dismissals

- (b)(5)



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## A Wide World of Motions

The image displays four side-by-side screenshots of the ICE 'Look Up Record' web application. Each screenshot shows a search interface with the following elements:

- Title:** 'Look Up Record' followed by the instruction 'Enter your search criteria.'
- Search Fields:** 'Look for' and 'Look in' dropdown menus, both set to 'Action' and 'Action Lookup View' respectively.
- Filter:** A 'Filter by' checkbox is present in the fourth screenshot.
- Table:** A table with a 'Name' column and a sort arrow. The first row is selected with a checkmark.
- Footer:** A pagination bar showing '1 - 30 of 30 (1 selected)' and a 'Done' button.

The motion types listed in the screenshots are:

- Screenshot 1:** ATD - MTN to Advance (selected), BIA Motion to Remand, BIA MTR, BIA MTR/Remand, Emergency Motion to Stay, U MTR, JWTR, MTN Admin Closure.
- Screenshot 2:** MTN Comp. Inquiry - U, MTN Comp. Remand - BIA, MTN for Extension of time-BIA (selected), MTN for Extension of time-U, MTN Franco-Class Notice U, MTN Franco-Class Remand BIA, MTN to Advance, MTN to Continue.
- Screenshot 3:** MTN to COV, MTN to Dismiss, MTN to Federal Stay, MTN to Preempt, MTN to Recalendar BIA, MTN to Recalendar U, MTN to Reconsider BIA, MTN to Reconsider U.
- Screenshot 4:** MTN to Reconsider BIA, MTN to Reconsider U, MTN to Stay BIA, MTN to Stay U, MTN to Suppress, MTN to Telephonic Hearing, MTN to Withdraw Counsel, Status Docket Review - Motion to Advance.



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## Best Practices for Managing Motions

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# Deadline Quick Reference

| Motion Type                      | Clock Starts                        | Days to Respond                   | Cite  |
|----------------------------------|-------------------------------------|-----------------------------------|---|
| <b>IJ Motions - Non-detained</b> |                                     |                                   |   |
| IJ Motion to Continue            | When received by Immigration Court  | 10 days                           | Practice Manual Chap. 3.1(b)(i)(A), (ii)(A) |
| IJ Motion for COV                | When received by Immigration Court  | 10 days                           | Practice Manual Chap. 3.1(b)(i)(A), (ii)(A) |
| IJ Motion to Dismiss             | When received by Immigration Court  | 10 days                           | Practice Manual Chap. 3.1(b)(i)(A), (ii)(A) |
| IJ Motion to Reopen              | When received by Immigration Court  | 10 days                           | Practice Manual Chap. 5.7(c)                |
| <b>IJ Motions - Detained</b>     |                                     |                                   |   |
| IJ Motion to Continue            | When received by Immigration Court  | As specified by Immigration Court | Practice Manual Chap. 3.1(b)(i)(B), (ii)(B) |
| IJ Motion for COV                | When received by Immigration Court  | As specified by Immigration Court | Practice Manual Chap. 3.1(b)(i)(B), (ii)(B) |
| IJ Motion to Dismiss             | When received by Immigration Court  | As specified by Immigration Court | Practice Manual Chap. 3.1(b)(i)(B), (ii)(B) |
| IJ Motion to Reopen              | When received by Immigration Court  | 10 days                           | Practice Manual Chap. 5.7(c)                |
| <b>BIA Motions</b>               |                                     |                                   |   |
| BIA Motion to Reopen             | Date of service of the motion brief | 13 days                           | Practice Manual Chap. 5.4                   |
| BIA Motion to Reconsider         | Date of service of the motion brief | 13 days                           | Practice Manual Chap. 5.4                   |
| BIA Motion to Remand             | Date of service of the motion brief | 13 days                           | Practice Manual Chap. 5.4                   |

<sup>[1]</sup> The date of receipt and the date of service are counted as "Day 0." Immigration Court Practice Manual Chap. 3.1(c); BIA Practice Manual Chap. 3.1(b).

<sup>[2]</sup> For non-detained aliens, if a filing is submitted less than fifteen days prior to a hearing, the response may be presented at the hearing. Immigration Court Practice Manual Chap. 3.1(b)(i)(A), (ii)(A)



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## Formatting Motions: IJ

- Immigration Court Practice Manual
- There is no official form for filing a motion before the Immigration Court. Motions must be filed with a cover page and comply with the requirements for filing in Chapter 3. OCIJ Practice Manual, Chap. 5.2(b) (Aug. 2, 2018).
- Include a proposed order for the IJ to sign.
- A motion's cover page must accurately describe the motion. The Immigration Court construes motions according to content rather than title and applies time and number limitations accordingly. *Id.*
- Parties are discouraged from filing compound motions. *Id.* at Chap. 5.4.



## Formatting Motions: BIA

- BIA Practice Manual
- There is no official form for filing a motion before the Board. BIA Practice Manual, Chap. 5.2(b).
- Include a certificate of service, a copy of the underlying order and any evidence not made part of the record by the IJ. *Id.* at Chap. 5.2(c), (e)-(f).
- The Board prefers a certain order for supporting documents. *Id.* at Chap. 3.3(c)(i)(B).
- A motion should be characterized and labeled as accurately as possible. The Board construes a motion according to its content, not its title, and applies time and number limits accordingly.



## Notating Motions in PLAnet

- Motions Events count the motion itself and the outcome
- Log your work in either the Motions Event itself or in a Case-Prep – Brief, Motions, Reply prep Event
  - Do not create a separate Motions Event to record your work
- Always select an Action to indicate the type of Motion Received
  - More motions exist than Actions – check with you local PLAnet gurus for your office’s practice
- Record the IJ’s decision in the Order field



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# Questions?



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## Relief from Removal



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# Relief from Removal



## *15 Tips*

DCC

OPLA Los Angeles

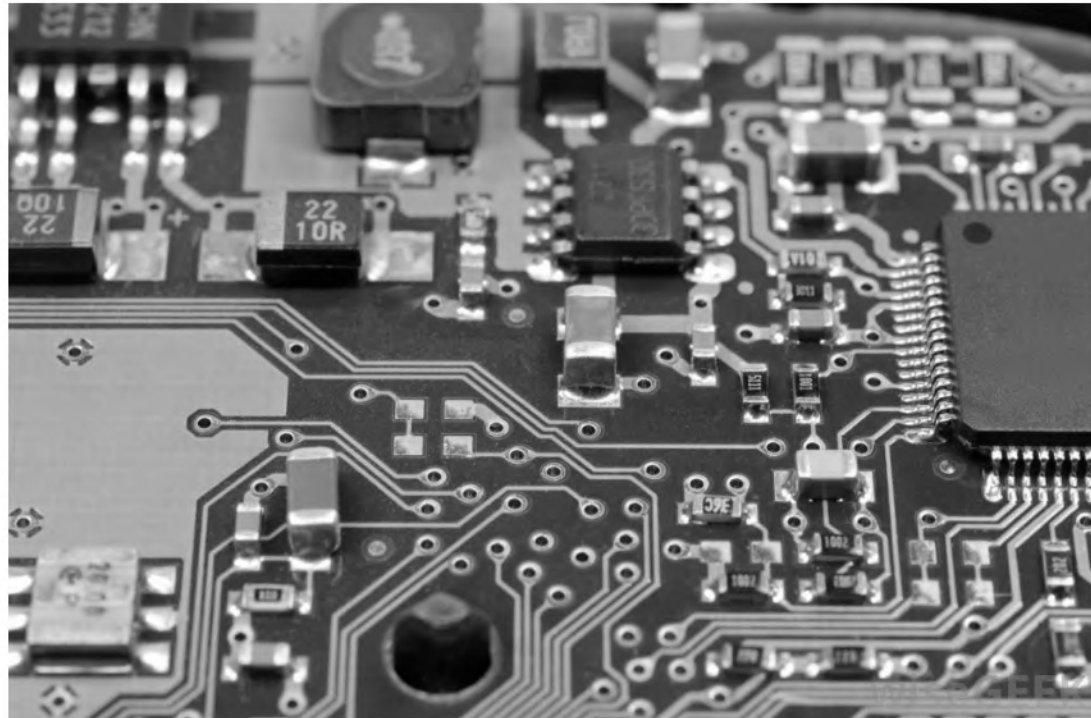
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DCC

OPLA New Orleans/Memphis

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## Know Your Circuit



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## Relief from Removal

### TIP 1:

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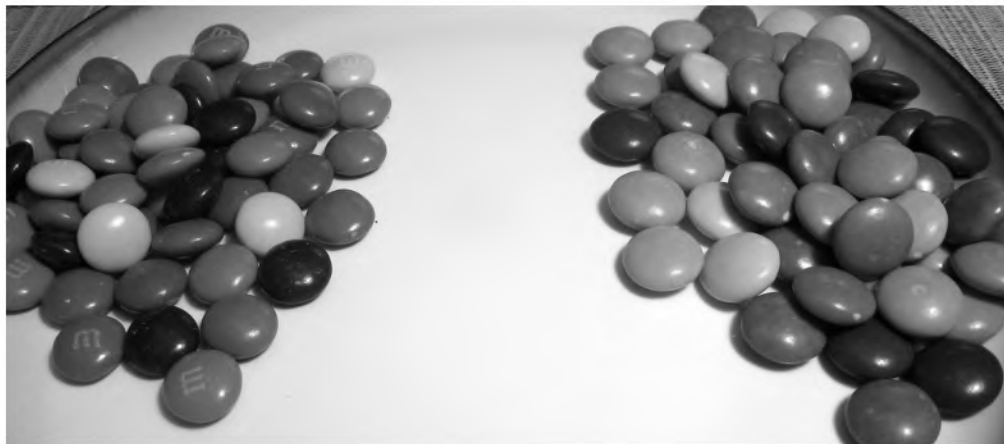
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## Relief from Removal

### TIP 2:

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## TIP 3:

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## TIP 3 (cont.):

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Relief from  
Removal

## TIP 3 (cont.):

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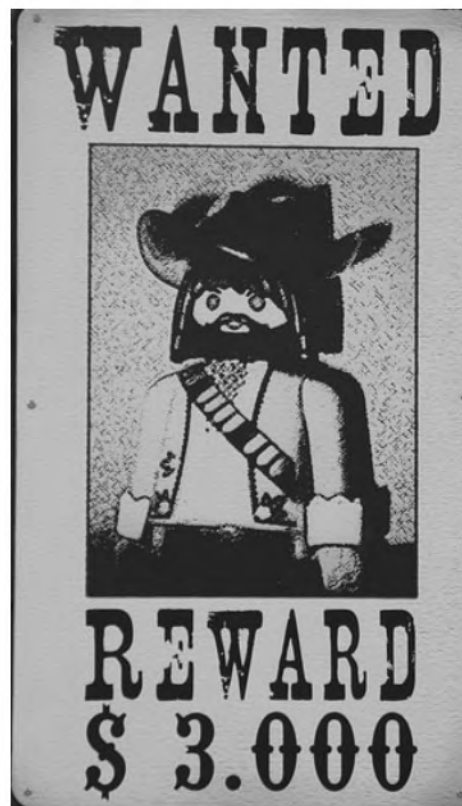
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## TIP 4:

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## TIP 5:

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## TIP 6:

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## TIP 6 (cont.):

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## Relief from Removal

### TIP 7:

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## TIP 8:

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## TIP 9:

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## TIP 10:

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## TIP 11:

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## TIP 12:

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## TIP 13:

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## TIP 14:

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## TIP 15:

**Make PLANet your friend – not your enemy.**

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## Extra TIP

**Do not recreate the wheel.**

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## Questions?



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## Expert Witnesses & Preparing DHS Witnesses

Presented by:

(b)(6); (b)(7)(C)

Deputy Chief Counsel  
OPLA Miami (PR & USVI)

(b)(6); (b)(7)(C)

Special Counsel  
OPLA FLO

*OPLA 101*



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## Overview

- Part I: Expert Witnesses
  - Relevance, qualifications, and reliability
  - *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993)
  - *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)
- Part II: Preparing DHS Witnesses
  - *Giglio v. United States*, 405 U.S. 150 (1972)
  - Should You Call a Witness?
  - Preparing Your Witness



## Evidence 101

- In removal proceedings, the “sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011).
- The Federal Rules of Evidence are not binding.
- However, they can be helpful.
- Why?
- If the evidence would be admitted under the Federal Rules of Evidence, this is strong support for the conclusion that admission comports with due process. *Id.* at 458 n.9.



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## Expert testimony generally

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## Experts in Immigration Ct.

Experts can testify on numerous issues:

- Country conditions for protection law cases (e.g. gang violence in Central America, military operations during the Bosnian War)
- Medical and psychological issues (e.g. trauma symptoms, mental disabilities)
- Legal issues (e.g. laws of another country);
- Forensic analysis (e.g. document authenticity).



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## Expert on the witness list-now what?

Pursuant to Chapter 3.3(g) of the Immigration Court Practice Manual, the respondent's witness list must include:

- a written summary of the testimony;
- a curriculum vitae or resume.



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## Is the testimony relevant?

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## Is the witness qualified?

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## Is the testimony reliable?

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## Is the testimony reliable? (Cont.)

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## Is the testimony reliable? (Cont.)

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## Process for Designation as an Expert & Objections at Hearing

The IJ—not the respondent’s attorney—determines whether a witness will actually be designated as an expert.

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## Voir Dire

The purpose is to vet the witness to determine whether the IJ should grant a request for expert testimony.

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## Voir Dire (cont.)



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## Undue Bias

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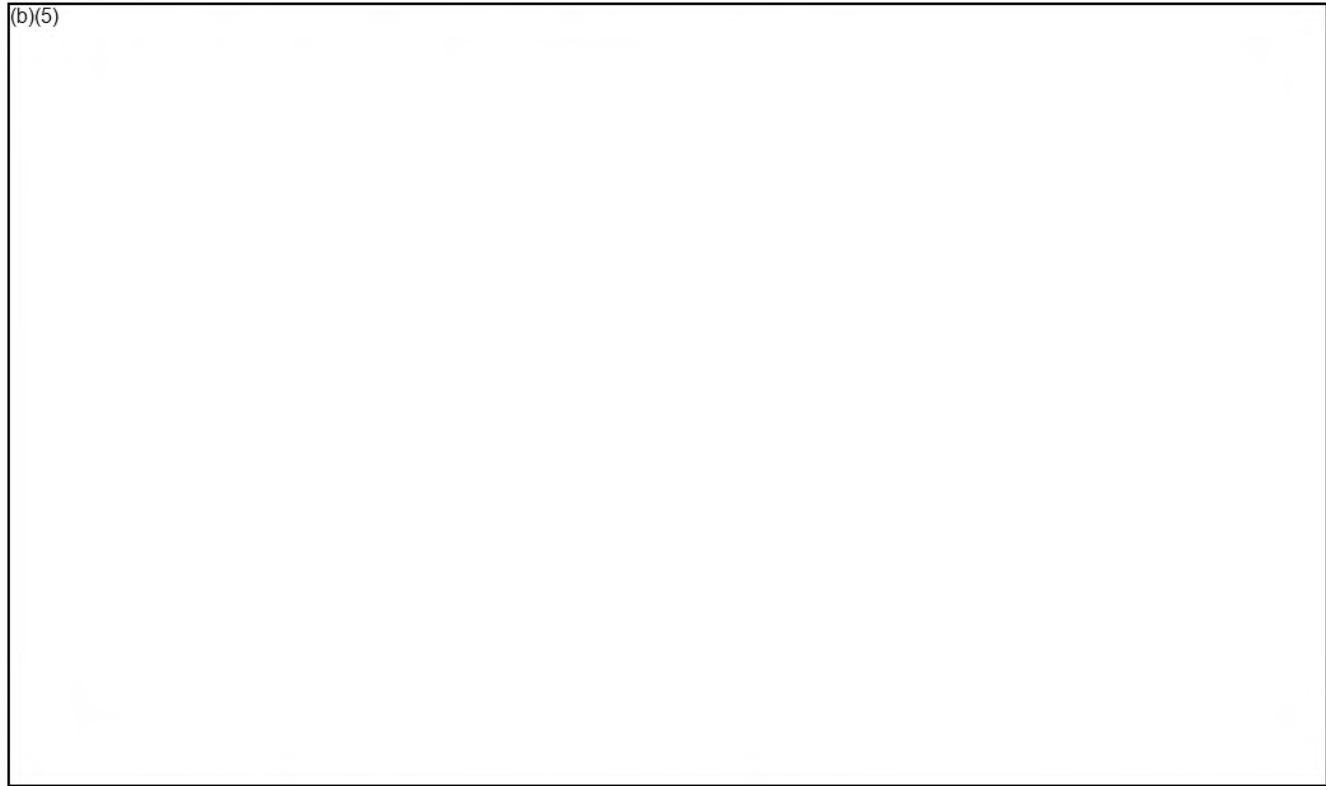


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## Voir Dire (cont.)

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- ◆ \*See handout with examples of some lines of questioning that may be used for voir dire.



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## The witness is designated as an expert - now what?

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## Weighing expert testimony

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## Weighing expert testimony

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## Weighing expert testimony

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## Potential Issues

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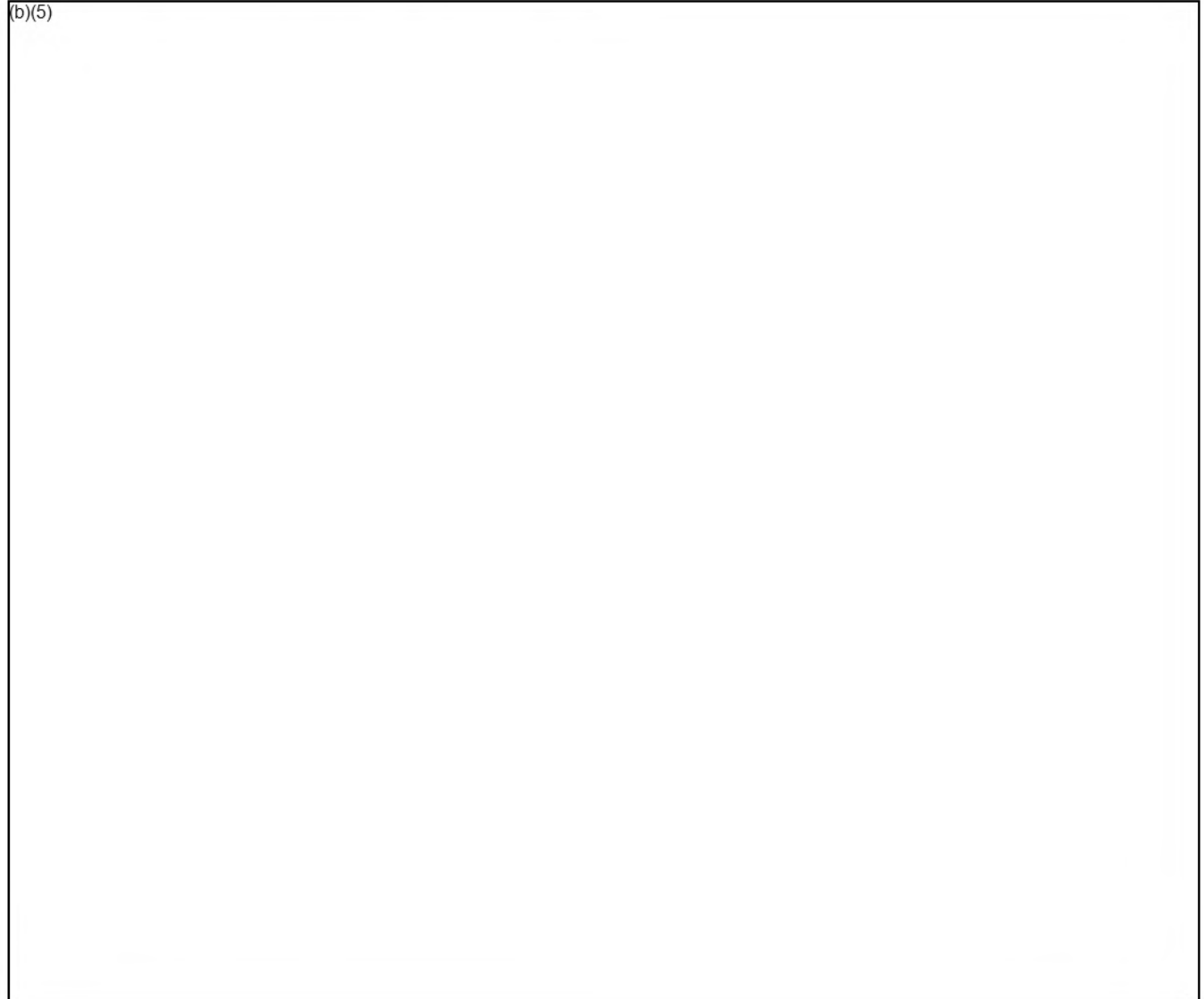
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## Potential Issues



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## Potential Issues

- Telephonic testimony
  - *Lopez–Umanzor v. Gonzales*, 405 F.3d 1049, 1056–57 (9th Cir. 2005) (IJ denied petitioner due process in excluding telephonic expert testimony when it “could provide information relevant to the IJ's most critical areas of doubt” and would cover issues not addressed in the written affidavits)
- Country reports v. expert testimony
  - *Vushaj v. Muskasey*, 289 Fed. Appx. 838 (6th Cir. 2008) (unpublished)
  - *Soew Ging Tie v. AG*, 328 Fed. Appx. 819 (3d Cir. 2009) (unpublished)
  - *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir.2004)



## Expert Witness Resources

- PLAnet
  - Doc Search
  - Event Notes Search
- Sharepoint
  - E.g., ILPD Blog Post, Sept. 28, 2018
  - [ILPD 2009 Guidance](#)
- Open Source (Google Scholar, Bing, etc.)





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# PREPARING DHS WITNESSES



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*Prepare, Prepare, Prepare*



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*“By failing to prepare, you  
are preparing to fail.”  
– Benjamin Franklin*



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## DHS Witnesses *Common Scenarios*

| <u>Type of Case</u>  | <u>Witness Called</u>   |
|----------------------|---|
| Fraud                | <ul style="list-style-type: none"><li>• FDNS officer</li><li>• USCIS adjudicator</li><li>• Asylum Officer</li><li>• HSI agent</li></ul> |
| Suppression          | <ul style="list-style-type: none"><li>• ERO officer</li><li>• HSI agent</li><li>• CBP officer</li></ul>                                 |
| HRLS case            | <ul style="list-style-type: none"><li>• Historian (expert witness)</li></ul>  |
| Discretionary Relief | <ul style="list-style-type: none"><li>• Victims of Crimes</li><li>• Federal/Local LEO</li></ul>   |



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## Should I Call a Witness?

- **KNOW YOUR CASE**

- What kind of case is this?
- What facts do I need to get into the record?
- What evidence do I have to establish these facts?



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## Should I Call a Witness?

...but do I really need a witness?

- Do I need a witness to get a document into the record?
- Do I need a witness because I don't have a document?



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## Should I Call the Witness?

- **KNOW YOUR WITNESS**

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## Should I Call the Witness?

- Checklist :

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## Do I need a Witness?

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## Do I need a Witness?

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## Do I need a Witness?

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## Do I need a Witness?



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## Approval of a DHS Witness

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## Approval of a DHS Witness

- In order to safeguard the interests of the government, the CC of your office will consult with the DPLA for FLO for concurrence before a witness is offered to testify in immigration court.
  - See Part IV of Principal Legal Advisor Tracy Short's "*Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Order*" issued August 15, 2017.



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## Approval of a DHS Witness

- Identify the best officer/agent to testify.
  - Discuss with Supervisor.
  - *See Part IV of Principal Legal Advisor Tracy Short's "Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Order" issued August 15, 2017.*
    - Requires consult with field counsel for witness from another agency (USCIS, CBP).



## *Giglio v. United States*

- *Giglio v. United States* 405 U.S. 150 (1972) – impeachment of a government witness
  - Duty to disclose impeachment information relating to government witnesses’ Constitutional right to a fair trial (due process request)
- Constitutional right to a fair trial (due process) requires:

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## *Giglio v. United States*

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## *Giglio v. United States*

- DHS *Giglio* policy (March 29, 2016)
  - Requires that DHS Components disclose:
    - Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation
    - Prior findings by a judge that an employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other conduct



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## *Giglio v. United States*

- ICE Directive 17013.1 (June 28, 2018)
  - “Impeachment information”
    - Finding of misconduct
    - Past or pending criminal charges
    - Allegation of misconduct bearing upon truthfulness, bias, or integrity



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# ICE

## *Giglio v. United States*

- ICE Directive 17013.1 (June 28, 2018)
  - “Impeachment information”
    - **Prior findings by a judge that an employee has testified untruthfully...engaged in an unlawful search or seizure**
    - Failure to follow ICE requirements, procedures, protocols in collection of evidence
    - Info suggesting employee is biased for or against defendant



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## I'm Calling a Witness!



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## I'm Calling a Witness!

- **Prior to meeting with witness you should**

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## I'm Calling a Witness!

- **Preparing the Witness**

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## I'm Calling a Witness!

- **Preparing the Witness**

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## I'm Calling a Witness!

- **Preparing the Witness**

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# I'm Calling a Witness!

- **Preparing the Witness**

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## I'm Calling a Witness!

- **Preparing the Witness**

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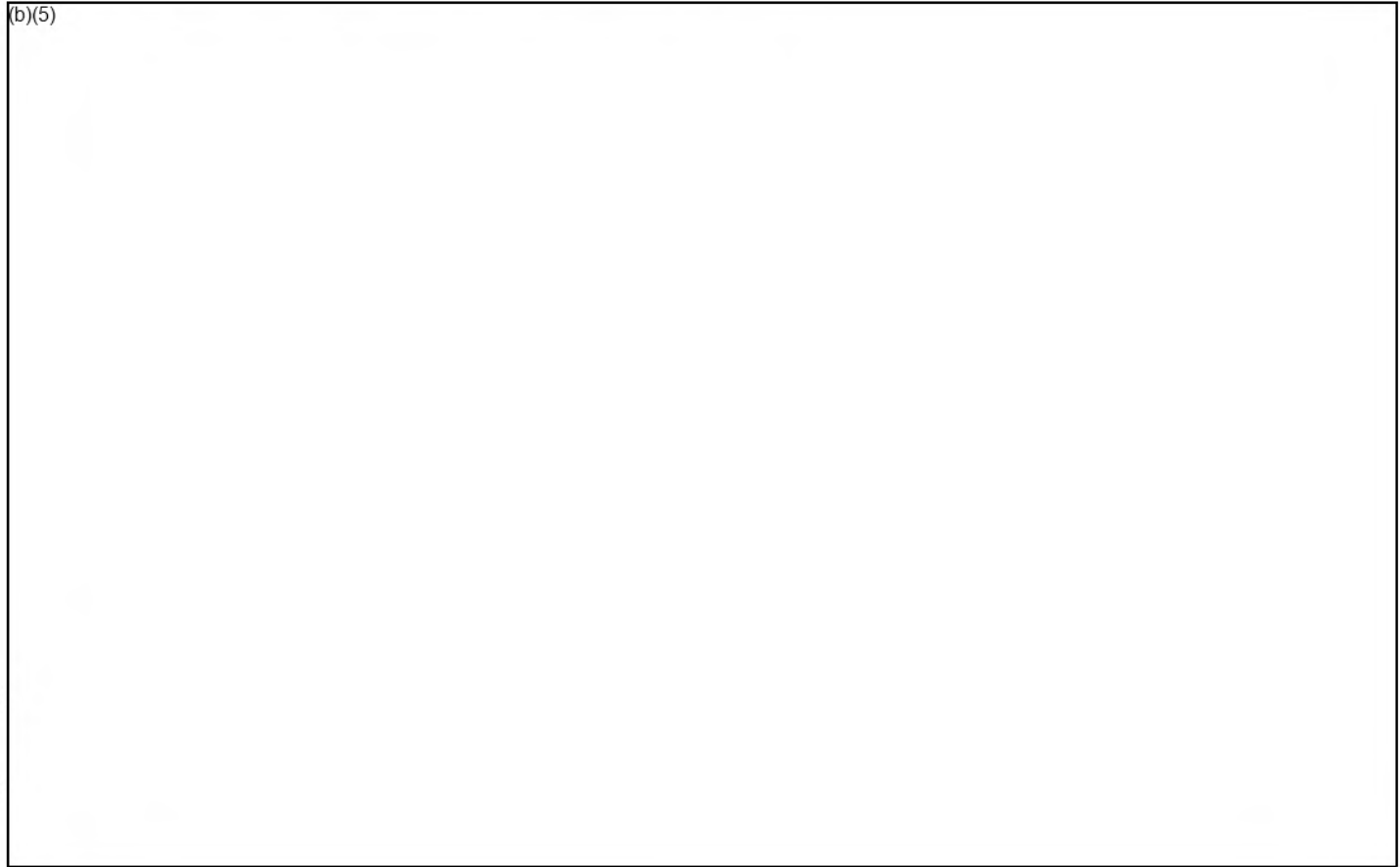
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# I'm Calling a Witness!

- **Preparing the Witness**

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## But ....

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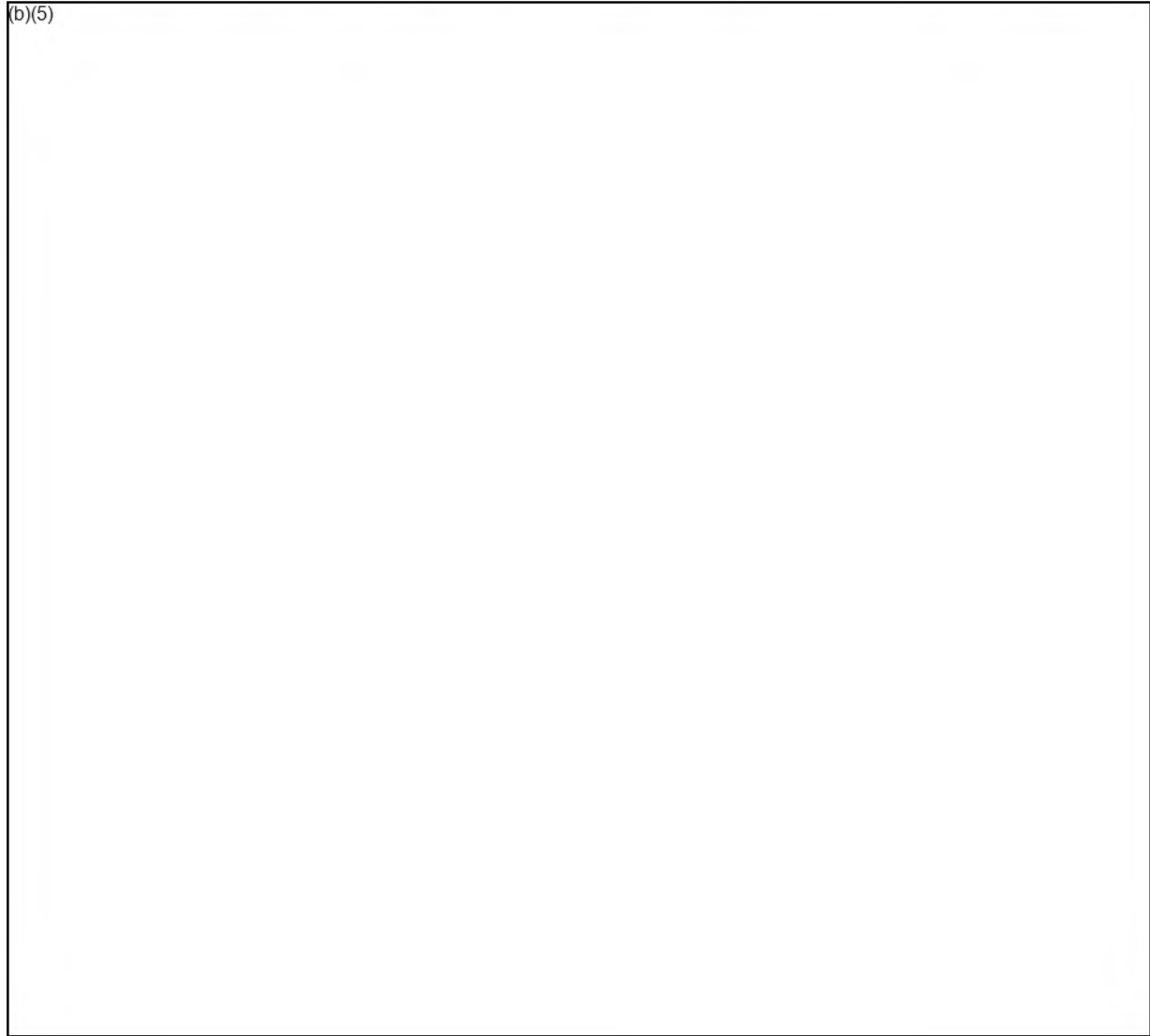


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## Final Important Thoughts

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## Final Important Thoughts

*Prepare, Prepare, Prepare*



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## Questions???



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